FILED

No. 97-641 OCT - 7 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,
Petitioner,

vs.

JEANA MARTIN; THE UNITED STATES DEPARTMENT OF EDUCATION; RICHARD W. RILEY, SECRETARY OF THE UNITED STATE'S DEPARTMENT OF EDUCATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General of California

CHARLTON G. HOLLAND, III
Senior Assistant Attorney General

JOHN H. SANDERS
Supervising Deputy Attorney General

JAMES F. AHERN
Deputy Attorney General
Counsel of Record

300 South Spring Street
Los Angeles, California 90013
(213) 897-2458

Counsel for Petitioner

Lawyers Brief Service • Appellate Brief Printers • (213) 613-1013 • (714) 720-1510

99

QUESTIONS PRESENTED

1. Whether a State by its participation as a state licensing agency in the federal program created by the Randolph-Sheppard Act, 20 U.S.C. § 107 *et seq.* ("the Act"), waives its Eleventh Amendment and sovereign immunity against monetary damages;

2. Whether the Act imposes a duty upon a State to act as a surrogate agent and protector of vendors licensed to operate facilities on federal property against wrongful acts of the federal agencies and to pursue the vendors' grievances against federal agencies through arbitration and litigation;

3. If such a duty is created by the Act, whether the Act empowers an arbitration panel to award compensatory damages to a vendor against a State for breach of such duty.

PARTIES TO THE PROCEEDING

All parties in this Court appear in the caption of the case.

The parties have no parent companies or non-wholly owned subsidiaries that have issued shares to the public.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 4

A. The Arbitration 4

B. The District Court Review 6

C. The Appeal to the Ninth Circuit 7

REASONS FOR GRANTING THE PETITION 8

A. A Conflict Exists in the Courts of Appeals' Interpretations of Whether a State's Participation in the Randolph-Sheppard Program Constitutes an Implied Waiver of Immunity 8

B. A Conflict Exists in the Courts of Appeals' Interpretations of the Duties Imposed by the Act Upon the States 12

C. A Conflict Exists in the Courts of Appeals' Interpretation of the Statutory Authority of the Arbitration Panel to Award Damages Against a State 13

CONCLUSION 18

APPENDIX A
OPINION, Ninth Circuit Court of Appeals, Filed July 11, 1997 ..... A1

APPENDIX B
JUDGMENT, United States District Court Central District of California Western District, Filed February 6, 1996 ..... B1

APPENDIX C
DECISION of the Arbitration Panel, Dated August 18, 1994 ..... C1

APPENDIX D
DECISION of the Arbitration Panel, Dated December 27, 1994 ..... D1

TABLE OF AUTHORITIES

Cases

Atascadero State Hospital v. Scanlon,
473 U.S. 234 (1985) 9, 10

Delaware Dept. of Health v. United States Dept. of Education,
772 F.2d 1123 (3d Cir. 1985) 8, 9, 13-16

Dellmuth v. Muth,
491 U.S. 223 (1989) 10

Georgia Department of Human Resources v. Bell,
915 F.2d 1482 (11th Cir. 1990) 12-14, 16

Lane v. Pena,
__ U.S. __ , 116 S.Ct. 2092,
135 L.Ed.2d 486 (1996) 11

McNabb v. U.S. Dept. of Education,
862 F.2d 681 (8th Cir. 1988) 9, 10, 13, 14, 16, 17

Pennhurst State School and Hospital v. Halderman,
465 U.S. 89 (1984) 9

Port Authority Trans-Hudson Corp. v. Feeney,
495 U.S. 299 (1990) 9

Tennessee Dept. of Human Services v. U.S. Dept. of Education,
979 F.2d 1162 (6th Cir. 1992) 9, 10, 13, 14, 16

Will v. Michigan Dept. of State Police,
491 U.S. 58 (1989) 15

Statutes

5 U.S.C. § 701 *et seq.* 4
5 U.S.C. § 703 8
5 U.S.C. § 706 4
20 U.S.C. § 107 *et seq.* 2
20 U.S.C. § 107a 2
20 U.S.C. § 107a(a) 2
20 U.S.C. § 107(a) 2
20 U.S.C. § 107b 2, 8
20 U.S.C. § 107b-1 2
20 U.S.C. § 107(b) 2
20 U.S.C. § 107b(6) 2
20 U.S.C. § 107d-1(a) 3, 4, 8
20 U.S.C. § 107d-1(b) 3, 4, 12, 14
20 U.S.C. § 107d-2 8
20 U.S.C. § 107d-2(a) 4
20 U.S.C. § 107d-2(b)(2) 4
20 U.S.C. § 107d-3(b) 2, 5
20 U.S.C. § 107d-3(b)(2) 2
28 U.S.C. § 1254(1) 1
42 U.S.C. § 1983 15

United States Constitution

Fifth Amendment 6
Eleventh Amendment 1, 6, 8-10, 12, 16, 17

PETITION FOR WRIT OF CERTIORARI

Brenda Premo, Director of the California Department of Rehabilitation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 119 F.3d 764 (9th Cir. 1997). The opinion is reproduced in Appendix "A" to this Petition. The order of the United States District Court for the Central District of California (Davies, D.J.) is unpublished and is reproduced in Appendix "B" to this Petition. The liability decision of the arbitration panel in this matter is reproduced in Appendix "C" to this Petition while the damages decision is reproduced in Appendix "D."

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit from which review is sought was entered on July 11, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This matter involves the following constitutional and statutory provisions.

The Eleventh Amendment to the U.S. Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens

> of another State, or by Citizens or Subjects of any Foreign State."

The Randolph-Sheppard Act, 20 U.S.C. §107 *et seq.* ("the Act"), provides employment opportunities for blind persons by granting a priority to blind persons to operate vending facilities on federal property. 20 U.S.C. §§107(a), 107(b). The U.S. Secretary of Education has overall responsibility for administration of the program at the federal level. 20 U.S.C. §§ 107(b), 107a(a). The program is administered through state agencies, designated as state licensing agencies, which negotiate with federal agencies to obtain locations for vending facilities upon federal property within the state, select and license qualified blind vendors, and provide specified services to the vendors. 20 U.S.C. §§ 107(b), 107a, 107b, 107b-1.

The Act requires that income from vending machines located upon federal property upon which a blind vendor is operating a vending facility on such property "shall accrue" to such blind vendor. 20 U.S.C. § 107d-3(b). The federal agencies upon whose property the vending machines are located are assigned responsibility for the collection of such vending machine income. 20 U.S.C. § 107d-3(b)(2).

To be designated the state licensing agency under the Act, a State must agree:

> ". . . to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title. "

20 U.S.C. § 107b(6).

In providing for arbitration of disputes between the vendor and the State, the Act states in relevant part that:

> "Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency . . . . If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

20 U.S.C. § 107d-1(a).

In providing for arbitration of complaints of the State against the federal agency, the Act states in relevant part:

> "Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder . . . such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter."

20 U.S.C. § 107d-1(b).

The Act also provides that if the panel convened to hear the complaint of the State finds that the acts or practices of the federal agency are in violation of the Act, "the head of any such department, agency or instrumentality shall cause such acts or practices to be terminated promptly and shall take such other action as may be necessary to carry out the decision of the panel." 20 U.S.C. § 107d-2(b)(2)

The arbitration panel's decision under both 20 U.S.C. § 107d-1(a) and 20 U.S.C. § 107d-1(b) is a "final agency action" which is subject to appeal and review pursuant to the Administrative Procedures Act (5 U.S.C. § 701 *et seq.*). 20 U.S.C. § 107d-2(a).

Accordingly, in reviewing the decision of the arbitration panel, the district court is required to "decide all relevant questions of law and interpret statutory and constitutional provisions," and to set aside the arbitration award if it is arbitrary, capricious, an abuse of discretion, not otherwise in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority or limitations; unsupported by substantial evidence; or unwarranted by the facts. 5 U.S.C. § 706.

STATEMENT OF THE CASE

This litigation arises from an arbitration held pursuant to the Act, to hear complaints of vendor Jeana Martin ("Martin") regarding actions taken by the California Department of Rehabilitation (the "Department") in its capacity as a state licensing agency.

A. The Arbitration

Martin alleged that the Department failed in its duty, allegedly imposed by the Act, to pursue her complaints of allegedly improper actions by the federal agency on whose property Martin's vending facility was located, the U.S. Postal

Service. Specifically, Martin complained that the Postal Service had failed to remit to her income from other vending machines located in the postal facility which were operated by a private vendor, and that the contract between the Postal Service and the private vendor called for prices so low that Martin was unable to compete with them. (Appendix C, pp. 10-14) Martin further alleged that the Department's failure to pursue her complaints against the Postal Service resulted in damages to her in the form of lost income and ultimately her loss of the facility and termination by the Department of her license. (Appendix C, p. 17)

The arbitration panel found that the Department had violated the "letter and spirit" of the Act. (Appendix C, p. 18) The violations found by the panel included the failure of the Department to "protect" the priority accorded to blind vendors under the Act, the failure to "insist upon" remittance to the Department of all vending machine income to which blind vendors were entitled, the failure to "stand firm" against the Postal Service contract for the operation of vending machines by a private vendor, and the Department's termination of Martin's license "without sufficient foundation." (Appendix C, p. 24) These actions were described as an "abrogation" of the Department's "duty" to act as "surrogate agent" and "protector" of the vendor against the "wrongs of the federal agency." (Appendix C, p. 21)

The only statutory language cited by the panel in support of its findings that the Department had affirmative duties to "protect," "insist" or "stand firm" in its dealings with the Postal Service were the provisions of 20 U.S.C. § 107d-3(b) requiring income from vending machines on federal property to accrue to the vendor. (Appendix C, pp. 19-20) The panel ignored that the obligation to collect such income is imposed upon the federal agency, the Postal Service in this case, and not upon the Department. Based upon its unsupported interpretation of the role of the state licensing agency as "protector" of the vendor, the panel imposed upon the Department a non-discretionary

obligation to pursue "through arbitration and litigation, if necessary" whatever grievances a vendor may assert against a federal agency. (Appendix C, p. 21)

The panel found that the Department's action in this case, including initiating arbitration against the Postal Service, were insufficient and that the Department's settlement of the disputed issues regarding vending machine income with the Postal Service prior to the arbitration hearing was "against public policy" and "contrary to the Act and its intent." (Appendix C p. 24)

The arbitration panel awarded Martin $449,923 in damages, composed of vending machine income not remitted to her by the Postal Service; lost income attributed to the prices established for the other vending machines on the property, the Department's failure to remodel Martin's facility and the termination of Martin's license; and attorneys' fees. (Appendix D, p. 6)

B. The District Court Review

The Department sought judicial review of the panel's award in U.S. District Court as provided in the Act. The Department alleged that the arbitration award violated the Eleventh Amendment and the procedural and substantive due process clauses of the Fifth Amendment. (Appendix B, p. 9) The Department's complaint articulated specific errors on the part of the arbitration panel, and sought a declaration that the panel's award was an unconstitutional and illegal exercise of power and abuse of discretion. (Appendix B, p. 9)

In its motion for disqualification of the arbitration panel, heard in conjunction with the parties' motions for summary judgment, the Department articulated additional significant errors to establish the Department's claim that the panel abused its discretion. Among others, the Department asserted that the Act provides no substantive right to the vendor to challenge the Department's decision not to pursue claims against the federal

agency, and that the Act imposed no duty upon the Department to collect vending machine income or remodel a vendor's facility. (Appendix B, pp. 15-16)

The district court properly reviewed the two specific allegations of error plead in the complaint under the standards of the A.P.A., despite the Department's failure to specifically plead a violation of the A.P.A. (Appendix B, pp. 15-16) The district court improperly refused, however, to consider the additional significant errors raised by the Department in its motion to disqualify the panel finding that these errors had not been specifically plead in the complaint and therefore were not properly before the court. (Appendix B, p. 20)

Following entry of judgment, the Department moved to amend its complaint to state the allegations raised in its motion prior to judgment. The district court denied the motion.

C. The Appeal to the Ninth Circuit

The Department appealed the decision of the district court to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the decision of the district court on July 11, 1997.

The Ninth Circuit's decision did not address whether the Act imposes a duty upon States to pursue vendors' complaints against a federal agency or authorizes awards of compensatory damages against a State. The court also erroneously stated that the parties did not dispute that the Act authorizes the arbitration panel to award compensatory damages. While acknowledging that the Act did not expressly provide for such awards, the Ninth Circuit nonetheless found that the Act impliedly authorized compensatory damages. (Appendix A, p. 9)

The Ninth Circuit also found that a State's agreement to participate in the Randolph-Sheppard program constitutes a waiver of its sovereign immunity against enforcement of arbitration awards for compensatory damages in federal court. This finding was based upon "overwhelming implication" from the text of the Act. The statutory text relied upon by the court

consisted of the requirement in 20 U.S.C. §107b that disputes with vendors be submitted to arbitration; the description in 20 U.S.C. § 107d-1(a) of such arbitration as "binding;" the provision in 20 U.S.C. § 107d-2 that the arbitration was subject to judicial review under the A.P.A.; and the provision of 5 U.S.C. § 703 of the A.P.A. stating that agency action is subject to judicial review "for judicial enforcement." (Appendix A, pp. 7-8)

REASONS FOR GRANTING THE PETITION

The Courts of Appeals have diverged dramatically in their interpretation of the duties, potential liabilities and sovereign immunity of the States participating in the Randolph-Sheppard program. As a result, some States are subjected to liability for monetary damages to vendors under the Act while other States are immune from such liability. The intervention of this Court is required to ensure the application of one certain and uniform standard to the States participating in this national program.

A. A Conflict Exists in the Courts of Appeals' Interpretations of Whether a State's Participation in the Randolph-Sheppard Program Constitutes an Implied Waiver of Immunity

The Courts of Appeals have reached inconsistent and irreconcilable conclusions regarding whether an award of damages and enforcement of such award in federal court under the Act is precluded by the Eleventh Amendment and principles of sovereign immunity.

The Third Circuit has concluded that a State's participation in the program created by the Act constitutes a waiver of its Eleventh Amendment sovereign immunity against awards of compensatory damages made under the Act. *Delaware Dept. of Health v. United States Dept. of Education*, 772 F.2d 1123 (3d Cir. 1985). The Ninth Circuit in the instant case arrived at

the same conclusion. The Sixth Circuit, in sharp contrast, concluded that States do not waive their Eleventh Amendment immunity from enforcement of damage awards in federal court by agreeing to participate in the program created by the Act. *Tennessee Dept. of Human Services v. U.S. Dept. of Education*, 979 F.2d 1162 (6th Cir. 1992). The Eighth Circuit, in a decision in which all three judges wrote separately, could not reach agreement on the issue of waiver of immunity. *McNabb v. U.S. Dept. of Education*, 862 F.2d 681 (8th Cir. 1988). The individual judges respectively concluded that: (1) the Act constituted a Congressional abrogation of States' immunity; (2) Congress had not expressed an intention to subject States to liability for damages; and (3) Congress had authorized awards of prospective but not retroactive compensatory damages.

This Court has spoken clearly, holding that a State's waiver of its sovereign immunity must be unequivocally expressed. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). A State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other construction. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 (1985). This Court has described the standard for establishing a waiver of a State's Eleventh Amendment immunity as "stringent." *Atascadero State Hospital v. Scanlon*, 473 U.S. at 241; *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).

Despite this Court's clear instructions, the Third Circuit in *Delaware Dept. of Health* and the Ninth Circuit in this case found a waiver of States' sovereign immunity by implication from the term "arbitration." The Third and Ninth Circuits concluded that because the States participate in a program which requires arbitration of disputes, and because arbitration generally includes the potential for compensatory relief, the States knowingly and voluntarily waived their immunity from monetary damages. *Delaware Dept. of Health*, 772 F.2d at 1138.

The Sixth Circuit reached the opposite conclusion from that of the Third and Ninth Circuits. Citing this Court's decisions in *Atascadero State Hospital* and *Dellmuth v. Muth*, 491 U.S. 223 (1989), the Sixth Circuit in *Tennessee Dept. of Human Services*, appropriately searched the text of the Act for an expression by Congress of "unmistakable intent" to abrogate the State's Eleventh Amendment immunity. *Id.*, at 1167. The court found "no mention" of "the possibility that a citizen might sue the state in federal court, of retroactive damages, or of sovereign immunity." *Id.* In the absence of textual expression, the Sixth Circuit found that while the Act authorizes an arbitration panel to award compensatory damages under the Act, States enjoy sovereign immunity from a vendor's attempt to enforce such an award in federal court. *Id.*

The Sixth Circuit refused to imply a waiver of immunity from the "mere reference" in the Act to binding arbitration. *Id.* Such reference, the court found:

> ". . . does not unmistakably suggest that a vendor will be able to collect retroactive damages in federal court or that a state will surrender its sovereign immunity. According to the Supreme Court, much more explicit language is required to abrogate or waive a State's sovereign immunity.
>
> The text of the Randolph-Sheppard Act reflects neither an unmistakable intention by Congress to abrogate the State's sovereign immunity nor a clear statement that participation in the program will constitute a waiver of immunity."

Id.

Similarly, in *McNabb*, Judge Doty of the Eighth Circuit found that Congress had failed to unambiguously provide in the Act that a State's participation constituted a waiver of immunity from damages or to condition a State's participation on

accepting liability for all forms of relief including retroactive damages. *Id.*, at 687.

The Ninth Circuit's conclusion in the decision below is in direct conflict with that of the Sixth Circuit. Moreover, the decisions of the Third and Ninth Circuits ignore the guidance regarding waivers of sovereign immunity provided by this Court in *Lane v. Pena*, ___ U.S. ___ , 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). In *Lane*, this Court held that a waiver of sovereign immunity must be "unequivocally expressed" in the statutory text and will not be implied. *Id.*, at 493. This Court expressly distinguished between a waiver of the government's sovereign immunity as to liability and a waiver of immunity from monetary damage awards, finding that Congress' waiver of immunity as to liability is not equivalent to a waiver of immunity as to money damages. *Id.*, at 495. Thus, even where a cause of action is authorized against the government, this Court has stated that the available remedies do not include money damages absent an express waiver of sovereign immunity as to such damages. *Id.*, at 496.

Although *Lane* involved a purported waiver of sovereign immunity by the federal government, its holding has equal application to a waiver of sovereign immunity by a State. Applying the principles articulated in *Lane* to the Act, no waiver of immunity as to damages can be found since the Act does not specifically express that a State must agree to subject itself to liability for money damages in order to participate. Absent such express consent by the States, the agreement to arbitrate disputes cannot be interpreted as a waiver of immunity as to money damages, but merely a consent to resolve disputes via arbitration.

At present, States are subject to differing interpretations of the Act, with the inequitable result that some States are subject to liability for damages under the Act while others are not. A substantial and significant conflict exists among the Courts of Appeals regarding whether a State's agreement to participate in the program created by the Act and to arbitrate vendors'

disputes creates a waiver of the State's Eleventh Amendment and sovereign immunity. That conflict can only be resolved by this Court.

B. A Conflict Exists in the Courts of Appeals' Interpretations of the Duties Imposed by the Act Upon the States

The Circuit Courts of Appeals have also reached irreconcilable and divergent conclusions regarding the duties imposed upon the States by the Act. A threshold issue exists whether the Act imposes a duty on the State to pursue a vendor's grievances against a federal agency. No such duty is expressly created by the Act. The Eleventh Circuit concluded that States have no duty to pursue remedies against the federal government on behalf of vendors. In stark contrast, the Ninth Circuit upheld the finding of the arbitration panel that the Department owed a duty to the vendors to remedy wrongful actions of the federal government by arbitration and even through litigation, if necessary.

The Eleventh Circuit Court of Appeals in *Georgia Department of Human Resources v. Bell*, 915 F.2d 1482 (11th Cir. 1990), concluded that the Act does not create a cause of action for damages for a State's alleged failure to pursue a vendor's complaints against a federal agency, because the Act at 20 U.S.C. § 107d-1(b) expressly gives the State discretion to seek arbitration with the federal agency. *Id.*, at 1487-88.

In contrast, the Ninth Circuit accepted without analysis the finding that the Department had a duty to pursue Martin's claims against the federal government. The arbitration panel found that the Department was obligated to remedy the failure of the Postal Service to provide Martin with income from vending machines operated by a private vendor under contract with the Postal Service. The panel found that the Department was required to pursue Martin's demands for such income "through arbitration and litigation, if necessary." (Appendix C,

p. 21). The decision removes any discretion on the part of the State whether to bring an arbitration. This expansive and unsupported interpretation of the obligations imposed on the States by the Act is directly contrary to that of the Eleventh Circuit in *Georgia Dept. of Human Resources*.

The opposing results reached by the Ninth and Eleventh Circuits create significant conflict concerning the scope of a State's obligations under the Act with respect to a vendor's complaints against a federal agency. Such conflicting results can only be resolved by this Court.

C. A Conflict Exists in the Courts of Appeals' Interpretation of the Statutory Authority of the Arbitration Panel to Award Damages Against a State

The Courts of Appeals have similarly diverged in determining whether the Act, as a matter of statutory construction, authorizes an arbitration panel to award compensatory damages against a State. The Third and Sixth Circuit Courts of Appeals, as well as the Ninth Circuit in the instant case, have held that as a matter of statutory construction, the Act authorizes the arbitration panel to award compensatory damages against a State. *Delaware Dept. of Health v. United States Dept. of Education*, 772 F.2d 1123 (3d Cir. 1985); *Tennessee Dept. of Human Services v. U.S. Dept. of Education*, 979 F.2d 1162 (6th Cir. 1992). The Eighth and Eleventh Circuits reached a contrary result. Although divided in its rationale, the Eighth Circuit found that an arbitration panel was not authorized by the Act to award retroactive compensatory damages. *McNabb v. U.S. Dept. of Education*, 862 F.2d 681 (8th Cir. 1988). The Eleventh Circuit found that no damage remedy was available under the Act for a vendor who complained of the State's failure to arbitrate the vendor's complaints regarding actions of the federal government. *Georgia Department of Human Resources v. Bell*, 915 F.2d 1482 (11th Cir. 1990)

In concluding that damages were available, the Third Circuit in *Delaware Dept. of Health* found that the term "arbitration" had a "well-recognized meaning" and that awards of compensatory relief by arbitrators in other contexts were "common." *Id.*, at 1136. Finding the statutory language "unambiguous," the Third Circuit found that the Act authorized awards of compensatory damages against a State. *Id.*, at 1137.

Similarly, the Sixth Circuit stated that Congress was "surely aware" that arbitration panels "routinely awarded" retroactive relief. *Tennessee Dept. of Human Services*, 979 F.2d at 1165. Accordingly, the court found that an award of compensatory damages against a State was within the statutory authority of an arbitration panel convened under the Act. *Id.*

The Ninth Circuit in the instant case adopted the rationale of the Third and Sixth Circuits that the use of the term "arbitration" in the Act provides statutory authority for an award of compensatory damages.

These decisions contrast sharply with the results reached by the Eighth and Eleventh Circuits. In *Georgia Dept. of Human Resources*, the Eleventh Circuit concluded that an award of damages was inconsistent with the remedial structure of the Act. The court reasoned that any vendor complaints against the federal government which the State elected to pursue would be subject to arbitration between the State and federal agency under 20 U.S.C. §107d-1(b). The court found that no arbitration panel hearing the vendor's claims against the State could competently assess what might have resulted from an arbitration between the State and federal government which did not occur. Accordingly, the Eleventh Circuit concluded that Congress could not have intended to create a cause of action for damages arising out of a State's failure to pursue arbitration against the federal government. *Id.* at 1486-87.

In *McNabb*, the Eighth Circuit concluded that the Act does not permit awards of retroactive compensatory damages against a State. One of the two judges who reached this conclusion, Judge Fagg, found that there was no statutory authority for an

award of any type of damages against a State. *Id.*, at 687. Judge Fagg found that although Congress undoubtedly had the authority to condition participation in the program upon acceptance of exposure to liability, the Act contained no reference to monetary remedies and failed to clearly inform the States considering participation that liability could result. *Id.*, at 686. Judge Fagg noted that this Court's precedents required that Congress "speak with a clear voice" and expressly articulate any conditions it sought to impose upon participating States. *Id.*, at 686-87. Judge Fagg rejected the analysis of the Third Circuit in *Delaware Dept. of Health*, because it required States "unwittingly to expose themselves to potentially sizeable financial obligations" on the strength of an "oblique reference to a dispute resolution mechanism that encompasses multiple remedies, including many with non-monetary characteristics." *Id.*, at 687. Judge Doty, writing separately, interpreted the Act "against the backdrop of the Eleventh Amendment," and agreed that the Act did not authorize the panel to award retroactive compensatory damages. *Id.* Judge Doty parted company with Judge Fagg in one respect, however, concluding that Congress had authorized awards of "prospective" damages. *Id.*

The interpretation of the Act advanced by the Third, Sixth and Ninth Circuit Courts of Appeals differs not only from that of the Eighth and Eleventh Circuits, it is also inconsistent with prior holdings of this Court. This Court has refused to interpret federal statutes as imposing liability for monetary damages upon the States absent a "clear and manifest intent" upon the part of Congress. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). In interpreting 42 U.S.C. § 1983, this Court stated that Congress must make its intention "clear and manifest" if it intends to alter the "usual constitutional balance between the States and the Federal Government," preempt the historic powers of the States or impose a condition upon the grant of federal monies. *Id.*, at 65. Further, this Court stated that any interpretation of whether a federal statute imposes liability must consider the principle of sovereign immunity. Recognizing that it is "an established principle of jurisprudence

that the sovereign cannot be sued in its own courts without its consent," this Court refused to conclude that Congress in enacting Section 1983 "intended to disregard the well-established immunity of a State from being sued without its consent." *Id.*, at 67.

As Judge Fagg noted in *McNabb*, nowhere in the Act did Congress clearly express an intent to subject the States to awards of retroactive compensatory damages. The conclusions of the Third, Sixth and Ninth Circuits that Congressional intent to authorize awards of money damages is implicit in the term "arbitration" falls far short of the "clear and manifest" expression required by this Court. As succinctly stated by the Sixth Circuit in *Tennessee Dept. of Human Services*, the "mere reference" to binding arbitration in the Act does not "unmistakably suggest" that a vendor will be able to collect damages in federal court or that a state will surrender its sovereign immunity. *Id.*, at 1168.

The Act's silence with respect to awards of compensatory damages has also resulted in conflicting interpretations by the U.S. Department of Education, the agency with responsibility for administration of the Act. Prior to the case at bar, the Department of Education had consistently taken the position that awards of compensatory damages are not available against a State. *Delaware Dept. of Health*, 772 F.2d at 1135 (federal government took the position that the arbitration award was contrary to the principle of sovereign immunity embodied in the Eleventh Amendment and not authorized by the Act); *McNabb*, 862 F.2d at 683 (federal government took the position that compensatory relief was not contemplated by the Act and such awards would be contrary to principles of sovereign immunity); *Georgia Dept. of Human Resources*, 915 F.2d at 1486 (federal government joined the state agency in challenging the arbitration award on Eleventh Amendment grounds); *Tennessee Dept. of Human Services*, 979 F.2d at 1165 (federal government supported the argument of the state agency that the Eleventh Amendment barred the arbitration award). Indeed, in the

district court below, the federal government did not oppose the Department's motion for summary judgment in which it asserted that the Eleventh Amendment prohibited an award of damages against a State by an arbitration panel under the Act. (Appendix B, p. 10)

Acknowledging that it was reversing its long-standing position, the federal government in its brief to the Ninth Circuit adopted the position that the Act authorizes awards of compensatory damages against the States, while continuing to argue that enforcement of such awards in federal court is barred by the Eleventh Amendment. The federal government's reversal of its long-standing interpretation of the Act as precluding compensatory damages against a State is significant. It illustrates that the Act does not clearly express an intent to impose such damages upon the States and that the States in agreeing to participate did not knowingly consent to and waive their immunity against awards of compensatory damages.

The Courts of Appeals' conflicting interpretations of the Act create substantial inequity regarding the liabilities of the States and can be resolved only by this Court's definitive interpretation of whether the Act authorizes an arbitration panel to award damages against a State. A substantial issue exists whether the language of the Act meets the standard required by this Court for imposition of liability upon the States. The imposition of financial liability upon States by implication creates an unfortunate incentive for States to "steer clear of laudable federal-state programs for fear of incurring hidden but nonetheless substantial financial liability." *McNabb*, at 687.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in the case at bar.

Dated: October 6, 1997.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of California

CHARLTON G. HOLLAND, III
Senior Assistant Attorney General

JOHN H. SANDERS
Supervising Dep. Attorney General

JAMES F. AHERN
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRENDA PREMO, Director of the Department of Rehabilitation, State of California,
Plaintiff-Appellant,

v.

JEANA MARTIN; The United States Department of Education; RICHARD W. RILEY, Secretary of the United States Department of Education,
Defendants-Appellees.

No. 96-55456

D.C. No. CV-95-00546-JGD

OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
June 9, 1997—San Francisco, California

Filed July 11, 1997

Before: Alfred T. Goodwin, Dorothy W. Nelson, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Nelson

OPINION

D.W. NELSON, Circuit Judge:

Brenda Premo, in her official capacity as the Director of the California Department of Rehabilitation (the "State"), appeals the district court's grant of summary judgment to Jeana Martin, the United States Department of Education, and Secretary of Education Richard Riley. Martin, formerly a blind vendor licensed under the Randolph-Sheppard Vending Stand Act (the "Act"), 20 U.S.C. §§ 107-107f, invoked the arbitration provisions of the Act in order to resolve a dispute between herself and the Department of Rehabilitation. An arbitration panel convened by the United States Department of Education awarded Martin damages, injunctive relief, and attorney's fees. The State subsequently brought suit in federal district court, claiming that the Eleventh Amendment prohibits Randolph-Sheppard arbitration panels from awarding compensatory relief. In the alternative, the State argued that the arbitration proceedings violated due process. Martin counterclaimed, seeking judicial enforcement of the award. The State responded that the Eleventh Amendment bars the enforcement of such awards in federal court. The district court granted Martin's motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Randolph-Sheppard Vending Stand Act, 20 U.S.C. §§ 107-107f, establishes a cooperative federal-state program that provides employment opportunities for the blind. The Act grants priority to blind persons who desire to operate vending facilities on federal property. 20 U.S.C. § 107(b). At the federal level, the Secretary of Education is charged with the overall responsibility for administering the Act. 20 U.S.C. §§ 107(b), 107a(a).

At the state level, state licensing agencies ("SLAs") designated by the Secretary of Education implement the program.

20 U.S.C. § 107a(a)(5). State participation in the program is voluntary, and a state agency seeking to be designated as a Randolph-Sheppard SLA must apply to the Secretary of Education and agree to a number of conditions. For example, the Act requires SLAs to give preferences to blind persons in need of employment, 20 U.S.C. § 107a(b), to negotiate with federal agencies for the operation of vending facilities on federal sites, 20 U.S.C. § 107a(c), and to equip the facilities, 20 U.S.C. § 107b(2). In addition, the state agency must:

> make application to the Secretary and agree —
>
> . . . .
>
> (6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

20 U.S.C. § 107b(6).

The facts relevant to this case are not in dispute. In 1985, the California Department of Rehabilitation, the designated SLA for the State of California, issued a license to Jeana Martin. The license permitted her to operate a snack bar and lunch room at the General Mail Facility of the United States Post Office in Santa Ana, California. Martin left the position in 1991 when she experienced financial losses and other difficulties. Although she relocated to other sites, her financial condition worsened, and the State revoked her license in 1992.

During this period, Martin twice requested a state hearing. In 1990, she filed a complaint alleging that the State had violated the Act by failing to take adequate steps to ensure compliance by the Postal Service. In 1992, she challenged the

State's termination of her vendor's license. In both cases, Martin was denied relief.

To contest these decisions, Martin invoked her right to arbitration by a panel convened by the Secretary of Education under 20 U.S.C. §§ 107d-1, 107d-2. Pursuant to the terms of the statute, Martin selected one panel member, the State selected another, and the panel members designated by Martin and the State agreed to a third person who chaired the panel.

During the course of the proceedings, the panel refused a number of the State's requests. First, the panel declined to grant a continuance to the State's attorney. When the State objected to Martin's selection of Robert Humphreys as a panel member because Humphreys previously had expressed a view about one of the legal issues affecting Martin, the panel chair overruled the objection. During the hearing, the panel admitted, over the State's objection, the testimony of Durward McDaniel, an attorney who had previously advised Martin.

In August of 1994, the panel ruled in favor of Martin. The panel determined that the State had violated the Act by refusing to secure the renovation of the vending facilities at Santa Ana, by failing to insist on assignment of income from competing vending machines to Martin, and by declining to take effective steps to prevent the Postal Service from renewing a contract with another vendor. Reasoning that these lapses were the cause of Martin's financial difficulties, the panel also concluded that the State had improperly terminated her license. In December 1994 the panel awarded Martin $379,025.05 in lost income and $70,898.65 in attorney's fees and costs. The panel also ordered the State to reinstate Martin's license, to restore her to a comparable vending facility, and to pay her at a rate of $5,731.94 per month until she is restored.

The State then filed this federal action, naming the Secretary of Education, the United States Department of Education

("federal defendants"), and Martin as defendants. The State claimed that the Eleventh Amendment prohibits Randolph-Sheppard arbitration panels from awarding compensatory relief and bars the enforcement of such awards in federal court. In the alternative, the State alleged that the denial of the continuance, Humphreys' participation as a panel member, and the admission of McDaniel's testimony amounted to a violation of due process. Martin counterclaimed, seeking enforcement of the arbitral award. Both the State and Martin filed motions for summary judgment. The federal defendants did not oppose the State's motion for summary judgment on Eleventh Amendment grounds but filed a motion for partial summary judgment on all other issues.

The district court granted summary judgment to Martin, concluding that the State had waived its sovereign immunity. The court further concluded that no violation of due process had occurred because the State is not a "person" within the meaning of the Fifth Amendment, and that the award was not arbitrary and capricious. Following this decision, the State filed a motion to amend its complaint, which the district court denied. This timely appeal followed.

STANDARD OF REVIEW

The question of Eleventh Amendment immunity is a purely legal issue that we review de novo. *Micomonaco v. Washington*, 45 F.3d 316, 319 (9th Cir. 1995).

An arbitral award under the Randolph-Sheppard Act is reviewed as an agency action under the standards set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. *See* 20 U.S.C. § 107d-2. Under the APA, agency action may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *In re Transcon Lines*, 89 F.3d 559, 563 (9th Cir. 1996).

We review a district court's denial of a motion to amend a complaint for an abuse of discretion. *Janicki Logging Co. v. Mateer*, 42 F.3d 561, 563 (9th Cir. 1994).

DISCUSSION

I. *Eleventh Amendment*

[1] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although the Amendment does not explicitly prohibit an action against a state by one of the state's own citizens, the Supreme Court has construed the Amendment as barring such suits. *See Welch v. Texas Highways & Pub. Transp. Dep't*, 483 U.S. 468, 472 (1987) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 (1890)). Even when a state is not a named party, as is the case here, the Eleventh Amendment may bar a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). However, there are two well-recognized exceptions to the Eleventh Amendment protection from suits for damages. Congress can abrogate a state's Eleventh Amendment sovereign immunity without the consent of the state in certain instances, or a state can waive its immunity by consenting to suit in federal court. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

[2] We have not as yet had occasion to consider the intersection of the Eleventh Amendment and the Randolph-Sheppard Act. Three other circuit courts have addressed the issue, with varying results. *See Tennessee Dep't of Human*

Serv. v. United States Dep't of Educ., 979 F.2d 1162, 1166-68 (6th Cir. 1992) (holding that Eleventh Amendment does not apply to arbitration proceedings under Randolph-Sheppard Act but that it does bar proceedings in federal court to enforce arbitral awards of compensatory relief); *McNabb v. United States Dep't of Educ.*, 862 F.2d 681, 683-84 (8th Cir. 1989) (refusing to enforce compensatory damages awarded by Randolph-Sheppard arbitration panel, in per curiam judgment with each judge writing separately); *Delaware Dep't of Health & Soc. Servs. v. United States Dep't of Educ.*, 772 F.2d 1123, 1137-38 (3d Cir. 1985) (concluding that states participating in Randolph-Sheppard program have waived their sovereign immunity to both arbitration proceedings and federal judicial enforcement of arbitral awards). As these decisions make clear, a case such as this one presents two central questions. First, does the Eleventh Amendment prevent Randolph-Sheppard arbitration panels from awarding compensatory relief? Second, does the Amendment bar the federal courts from enforcing such awards?

The district court relied on *Delaware* to conclude that by participating in the Randolph-Sheppard program, the State has waived its sovereign immunity to both arbitral awards and federal actions to enforce such awards. Martin agrees. Citing *Tennessee*, the federal defendants take the position that the Eleventh Amendment does not limit the authority of Randolph-Sheppard arbitral panels to award compensatory relief but does bar federal courts from enforcing such awards. The State maintains that the Eleventh Amendment limits the authority of both the arbitral panels and the federal courts to fashion compensatory relief.

We affirm the decision of the district court. We conclude that the Eleventh Amendment does not apply to Randolph-Sheppard arbitration proceedings and thus does not limit the authority of arbitration panels convened under the Act to award compensatory relief. In addition, we believe that the overwhelming implication of the Act is that participating

states have waived their sovereign immunity to suit in federal court for the enforcement of such awards.[1]

A. *Authority of the Randolph-Sheppard arbitration panel to award compensatory relief*

[3] The State's position that the Eleventh Amendment deprives Randolph-Sheppard arbitration panels of the authority to award compensatory relief is wholly unsupported. The text of the Amendment clearly indicates that it does not apply to arbitration proceedings. In referring to the "Judicial power of the United States," the Amendment on its face limits only the authority of Article III courts. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (noting that "the fundamental principle of sovereign immunity" embodied in the Amendment "limits the grant of *judicial authority in Art. III*") (emphasis added). The Amendment does not purport to affect proceedings in tribunals established by statute. *See Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 567 (8th Cir. 1980) ("[A]dministrative action against states pursuant to individual complaints does not run afoul of the eleventh amendment").

Of the three circuits to consider the effect of the Eleventh Amendment on Randolph-Sheppard arbitral proceedings, one has held that the Amendment does not apply, and another has clearly indicated its support for this view. *See Tennessee*, 979 F.2d at 1167 ("[T]he Eleventh Amendment does not apply to such an arbitration panel."); *Delaware*, 772 F.2d at 1138 (noting that position that Eleventh Amendment applies to Randolph-Sheppard arbitration panels is "hardly supportable by the text"). The third court that addressed the matter did not decide the question. *See McNabb*, 862 F.2d at 683. We follow the opinion in *Tennessee* and conclude that the Eleventh

[1]The parties do not argue, and we do not consider, the question of whether Congress abrogated the sovereign immunity of states participating in the Randolph-Sheppard program.

Amendment does not apply to proceedings before Randolph-Sheppard arbitration panels.

[4] We note that the parties do not dispute that, as a matter of statutory construction, the Randolph-Sheppard Act gives arbitration panels the authority to award compensatory relief. The Act provides that states must agree to provide blind licensees "dissatisfied with *any action* arising from the operation or administration of the vending facility program" with a hearing and to "*submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration* as provided in section 107d-1." 20 U.S.C. § 107b(6) (emphasis added). Section 107d-1(a) further provides that an arbitration panel convened to resolve a dispute between a state and a blind vendor "*shall be final and binding on the parties*" (emphasis added).

[5] It has been widely recognized that this language permits arbitration panels to award compensatory relief. *See, e.g., Tennessee,* 979 F.2d at 1165 ("The natural reading of these provisions is that the arbitration panel may consider and resolve any complaint of a vendor arising out of the program, including a complaint that the state agency has taken money to which the vendor is entitled."); *Delaware,* 772 F.2d at 1137 (noting that "the statutory language is unambiguous" in allowing compensatory relief). In drawing this conclusion, courts have emphasized that the prevailing conception at the time the Act was passed was that arbitral resolution of disputes involved awards of back pay and other forms of compensatory relief. *See, e.g., Tennessee,* 979 F.2d at 1165; *Delaware,* 772 F.2d at 1136.

Thus, while it is true that the Act does not refer expressly to compensatory relief and one circuit judge has concluded that the Act does not permit such relief, *see McNabb,* 862 F.2d at 687, this view has been largely discredited. Indeed, the federal defendants, who in the past have argued that the Act did not permit such relief, now concede that their prior posi-

tion was incorrect. Accordingly, we conclude that the arbitration panel had the authority to award compensatory relief to Martin.

B. *Enforcement of compensatory Randolph-Sheppard arbitral awards in federal court*

[6] Consent by a state to be subject to judicial enforcement of a damages award has long been recognized as an exception to Eleventh Amendment immunity. *See, e.g., Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 308-09 (1990); *Atascadero*, 473 U.S. at 238. A state will be deemed to have waived its sovereign immunity when (1) the state expressly consents to suit; (2) a state statute or constitution so provides; or (3) Congress clearly intended to condition the state's participation in a program or activity on the state's waiver of immunity. *Micomonaco*, 45 F.3d at 319. However, waiver will be found "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Port Authority*, 495 U.S. at 305 (alteration in original) (internal quotations and citations omitted).[2]

[7] In this case, the State of California has not expressly consented to suit. Nor has California enacted a statute that provides for waiver. The California statute establishing the state counterpart to the federal Randolph-Sheppard program does provide that the decision of an arbitration panel "shall be final and binding on the parties except as otherwise provided in the act." Cal. Welf. & Inst. Code § 19635 (West 1991). While this statute clearly reflects California's intent to be bound by Randolph-Sheppard arbitral awards, it does not pro-

[2]While the Supreme Court recently has narrowed the circumstances in which Congress has the authority to abrogate sovereign immunity, even when Congress's intent to do so is explicit, the Court's ruling does not affect the "unremarkable, and completely unrelated" matter of state waiver. *See Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1128 (1996).

vide clear enough consent to suit in federal court to amount to an express statutory waiver of sovereign immunity. *See Atascadero*, 473 U.S. at 241.

[8] However, the evidence that Congress conditioned state participation in the Randolph-Sheppard program on consent to federal judicial enforcement of compensatory awards is overwhelming. The statute explicitly requires participating states to agree to a number of conditions. Specifically, each state agency "shall . . . agree" to provide any dissatisfied blind vendor with the opportunity for a fair hearing and "to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration." 20 U.S.C. § 107b. The statute further provides that arbitration "*shall be final and binding on the parties.*" 20 U.S.C. § 107d-1(a) (emphasis added). In addition, the arbitration decision "shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5 [5 U.S.C. §§ 701-706 of the APA]." *See* 20 U.S.C. § 107d-2. The APA provides that "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. Thus, by requiring the states to submit to "binding" arbitration, and by providing for appeal and review under the APA, the Randolph-Sheppard Act unequivocally guarantees that arbitration awards will be judicially enforceable.

[9] We believe that these statutory provisions also reflect participating states' consent to the enforcement of arbitration awards in *federal* court. The Randolph-Sheppard Act is federal, and an agency of the federal government, the Department of Education, is charged with the responsibility of convening arbitration panels under the Act. It is true, as the federal defendants point out, that the Act does not specifically designate federal courts as the proper tribunals for the enforcement of such awards. Blind vendors might be able to bring suit in state court to enforce arbitration awards. Yet the fate of such suits is uncertain, as state doctrines of immunity may apply. *See Tennessee*, 979 F.2d at 1169 n.4. We do not

think that the mere possibility of state court enforcement satisfies the statute's command that arbitration must be binding.

[10] Under these circumstances, there is no "room for any other reasonable construction" of the statute. *Port Authority*, 495 U.S. at 305. The overwhelming implication of the statute is that by agreeing to participate in the Randolph-Sheppard program, states have waived their sovereign immunity to enforcement of such awards in federal court.

II. *Arbitral Award*

The State contests the arbitral award on a number of grounds. All of these arguments are without merit.

A. *Due process and judicial review under the APA*

In its federal complaint, the State alleged that the arbitral proceedings violated due process in several respects. Because the State is not a "person" for the purposes of the Fifth Amendment, the State's reliance on the Due Process Clause was misplaced. *See South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966). The State should have invoked the judicial review provisions of the APA, which the Randolph-Sheppard Act designates as imposing the proper standard for evaluating an arbitral award. 20 U.S.C. 107d-2(a). Under the APA, an agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see In re Transcon Lines*, 89 F.3d at 563. The district court evaluated the State's claims under the APA standard and rejected each in turn. We affirm the district court's decision.

[11] First, the State contends that the selection of Humphreys as a panel member was inappropriate because he had written a letter to State officials in 1990, at the request of Martin's former attorney. The State maintains that Humphreys's presence on the panel created "evident partiality," in

violation of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10(a)(2). Even if the FAA were applicable here, because Humphreys's prior involvement with Martin was fully disclosed, the State has not made the required showing of "actual bias" by "specific facts which indicate improper motives." *Woods v. Saturn Distribution Corp.*, 78 F.3d 424, 427 (9th Cir.) (quotations and citation omitted) (upholding award of arbitration panel consisting entirely of employees and authorized dealers of one party), *cert. dismissed*, 117 S. Ct. 30 (1996). Moreover, the Randolph-Sheppard Act itself permits at least a minimal degree of partiality by allowing each party to select a panel member. 20 U.S.C. § 107d-2(b)(1). Rather than prohibiting individuals with pre-existing relationships from becoming panel members, the Act instead seeks to neutralize any bias by requiring the parties to agree on a third panel member, the chair. *Id.* Viewed in light of these provisions, the panel's refusal to disqualify Humphreys was not arbitrary, capricious or an abuse of discretion.

[12] Second, the State argues that the panel abused its discretion by denying the State's request for a 60-day continuance. Yet there is no evidence that the denial was improper. The parties had agreed to the hearing date five months in advance. In addition, the panel denied the continuance a full two months before the scheduled date, leaving the State ample time to prepare. Accordingly, we conclude that the panel's decision was not arbitrary, capricious, or an abuse of discretion.

[13] The State's third contention, that the panel improperly admitted the expert testimony of McDaniel, Martin's former lawyer, is also without merit. McDaniel's testimony, which concerned the legal requirements of the Randolph-Sheppard Act, was relevant. The State had the opportunity to demonstrate any bias McDaniel may have had on cross-examination. It was not arbitrary, capricious, or an abuse of discretion for the panel to admit McDaniel's testimony.

We affirm the district court's decision that the arbitration proceedings complied with the APA.

B. *The State's post-judgment motion to amend its complaint*

The State moved to amend its complaint under Rule 15(a) of the Federal Rules of Civil Procedure *after* the district court issued a final judgment in this case. Because it had improperly framed its procedural objections to the arbitration as due process challenges, the State sought to restate its claims under the APA. In addition, the proposed amended complaint contained new allegations forming the basis for additional claims.

[14] While Rule 15(a) establishes that leave to amend should be "freely given," post-judgment motions to amend are treated with greater skepticism than pre-judgment motions. *See* Charles Alan Wright & Arthur Miller, 6 *Federal Practice and Procedure* § 1489 (1990). The likelihood that amendment will cause undue delay in the proceedings is a legitimate rationale for denying a motion to amend. *See Janicki,* 42 F.3d at 566. After a judgment has been issued, the conclusion that amendment will cause undue delay is particularly justified. *See id.* at 566-67. Here, the district court treated the State generously, analyzing its claims under the proper legal standard even though that standard was not articulated in the complaint. Moreover, the State had ample opportunity to file an amended complaint with new allegations before the court issued its final judgment. Under these circumstances, it was not an abuse of discretion for the court to refuse to allow the State to expand its case after a final decision had been made.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT

FILED
Clerk, U.S. District Court
FEB 6, 1996
Central District of California
By /s/ J. Holmes, Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRAP, RULE 77(d).

BRENDA PREMO, As Director of
the Department of Rehabilitation,
State of California,
Plaintiff,

v.

JEANA MARTIN; THE UNITED STATES
DEPARTMENT OF EDUCATION; and
RICHARD RILEY, Secretary of the
United States Department of Education,
Defendants.

CASE NO. CV 95-0546 JGD

JUDGMENT

The evidence and issues presented having been fully considered, and a decision having been duly rendered, the Court hereby ORDERS that judgment be entered in favor of Defendants Jeana Martin, the United States Department of Education, and Richard Riley, and against Plaintiff Brenda Premo, on all claims for relief alleged in the complaint, and that judgment be entered in favor of Defendant Jeana Martin, and against Plaintiff Brenda Premo, on the claims for relief alleged

in the counterclaim. It is hereby ordered and adjudged that the Plaintiff shall comply forthwith with the December 27, 1994 order of the arbitration panel.

IT IS SO ORDERED.

Dated: Feb 6, 1996

/s/ JOHN G. DAVIES

JOHN G. DAVIES
United States District Judge

CV 95-546-JGD(CTx)

SERVICE LIST

JAMES F. AHERN
DEPUTY ATTORNEY GENERAL
300 SO. SPRING STREET, STE 900 NORTH
LOS ANGELES, CA 90013

YTURBIDE & JENKINS
JAMES JENKINS
512 VAN NESS AVE., STE 408
SAN FRANCISCO, CA 94102-3267

CNSL FOR FEDERAL DEFTS
MARY L. PERRY,
ASST. U.S. ATTORNEY
ROOM 7516, FEDERAL BLDG
300 NO. LOS ANGELES STREET
LOS ANGELES, CA 90012

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT

FILED
Clerk, U.S. District Court
FEB 6, 1996
Central District of California
By /s/ J. Holmes, Deputy

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRAP, RULE 77(d).

BRENDA PREMO, As Director of
the Department of Rehabilitation,
State of California,
Plaintiff,

v.

JEANA MARTIN; THE UNITED STATES
DEPARTMENT OF EDUCATION; and
RICHARD RILEY, Secretary of the
United States Department of Education,
Defendants.

CASE NO. CV 95-0546 JGD

ORDER (1) DENYING PLAINTIFF'S MOTION FOR DISQUALIFICATION OF THE ARBITRATION PANEL, AND REVERSAL OF THE PANEL DECISION, (2) DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND (3) GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND (4) GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On November 20, 1995, the following motions came on for hearing: (1) Plaintiff's Motion for Disqualification of the Arbitration Panel, for Reversal of the Panel Decision, and for Remanding to the U.S. Department of Education for a New Arbitration Panel, and Hearing (hereinafter "Motion for Disqualification of the Arbitration Panel"); (2) Plaintiff's Motion for Summary Judgement, (3) Defendant Jeana Martin's Motion for Summary Judgment, and (4) Motion of Defendants United States Department of Education and Richard Riley for Partial Summary Judgment.

The Court, having considered the parties' written submissions, and the oral arguments of counsel, hereby DENIES the Plaintiff's Motion for Disqualification of the Arbitration Panel, DENIES Plaintiff's Motion for Summary Judgment, GRANTS Defendant Jeana Martin's Motion for Summary Judgment, and GRANTS the Motion of the Defendants United States Department of Education and Richard Riley for Partial Summary Judgment.

Background

Plaintiff Brenda Premo brings this action in her official capacity as Director of the Department of Rehabilitation, State of California, for review of an arbitration panel's decision to award damages for violations of the Randolph-Sheppard Vending Stand Act, ("the Act") 20 U.S.C. § 107-107f.

The named Defendants are Richard Riley, Secretary of the United States Department of Education, and the United States Department of Education (the "Federal Defendants"), which convened the arbitration panel, and Jeana Martin, a blind vendor licensed by the Department of Rehabilitation pursuant to the provisions of the Act.

The Randolph-Sheppard Vending Stand Act

Congress enacted the Randolph-Sheppard Vending Stand Act to give blind persons employment and economic opportunities. The act authorizes blind persons to operate vending facilities on federal property. 20 U.S.C. § 107(b).

The Rehabilitation Services Administration of the U.S. Department of Education is responsible for overseeing the administration of the Act's programs and provisions on the federal level. 20 U.S.C. § 107a. The Act requires the Secretary of the Department of Education (the "Secretary") to prescribe regulations to assure that, wherever feasible, one or more vending facilities are established on all federal property, and that blind vendors licensed under the Act receive priority to operate these facilities.

In addition, the Secretary designates a state licensing agency to administer the Act within each state. 20 U.S.C. § 107a(a)(5). The state licensing agency issues vending licenses to the blind vendors, selects locations for vending facilities on federal property, and selects the type of vending facility to be provided to the vendor. The licensing agency also provides the blind licensee an initial stock of inventory for the vending facility and a petty cash fund. 20 U.S.C. § 107b(2). Thereafter, the vendor is entitled to profits and responsible for losses. The vendor is also responsible for other operating expenses, including the replacement of inventory and the payment of sales tax. *Committee of Blind Vendors of the District of Columbia v. District of Columbia*, 736 F. Supp. 292, 296 (D.D.C. 1990).

To resolve grievances that may arise between a blind vendor and the state licensing agency the Act provides a set of remedial procedures. Title 20 U.S.C. § 107b(6) provides that any state agency desiring to be a state licensing agency under the Randolph-Sheppard Act must agree:

> to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair

> hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

The procedures for selecting the arbitration panel are set forth in section 107d-2. The Secretary shall convene an ad hoc arbitration panel upon receipt of a complaint filed by a blind vendor. The panel is to be composed of three members: one designated by the state licensing agency, one designated by the blind licensee, and one member, jointly designated by the other two members, and who serves as chairman of the panel. 20 U.S.C. § 107d-2(b)(1).

The only restriction the Act places on the selection of arbitration panel members is that the chairman may not be employed by the state licensing agency, or its parent agency. 20 U.S.C. § 107d-2(a)(1)(c).

Section 107d-2 also provides that the decision of the arbitration panel shall be considered the final agency action of the Department of Education, and is reviewable under the Administrative Procedure Act, 5 U.S.C. § 706.

Facts

The California Department of Rehabilitation is the state licensing agency responsible for administering the Act in California. In 1985 the Department of Rehabilitation licensed Defendant Jeana Martin as a vendor, pursuant to the provisions of the Act. From 1985 to 1991, Martin operated a snack bar/lunchroom, and placed several vending machines at the General Mail Facility of the United States Postal Service in Santa Ana, California.

On June 25, 1992, the Department of Rehabilitation revoked Martin's license as a vendor for unsatisfactory performance. Martin, after exhausting her administrative appeals, filed a complaint for arbitration with the Secretary. The complaint alleged that the Department of Rehabilitation failed to protect

Martin's priority to operate vending facilities as required by the Act. Specifically, the complaint alleged that the Department of Rehabilitation failed to take effective action when the management of the General Mail Facility entered into an unlawful "break-even" contract with a commercial vending company, Canteen Corporation. This Contract authorized Canteen Corporation to operate vending machines at the General Mail Facility in direct competition with Martin, and at prices with which Martin was unable to compete. The complaint also alleged that the Department of Rehabilitation failed to remodel the snack bar/lunchroom despite its recognition that remodeling was necessary to assure Martin the effective conduct of the business. As a result of these failures to protect Martin's rights under the Act, Martin suffered a substantial loss of business, and the subsequent termination of her license.

The Secretary convened an arbitration panel. Pursuant to the provisions of the Act, Martin and the Department of Rehabilitation each appointed one individual to the arbitration panel. Martin selected Robert R. Humphreys and the Department of Rehabilitation selected Joan Silverman. These two members jointly selected Edna E.J. Francis to serve as the third member of the panel, and chairperson.

On April 14 and 15, 1994, the arbitration panel conducted a hearing. In an order dated August 18, 1994, the panel expressed its findings that the Department of Rehabilitation failed to protect Martin's rights as a vendor under the Act, and that this failure caused a substantial loss of business. The panel also found that the Department of Rehabilitation then shifted the blame for the loss of business to Martin, an as a result, wrongfully terminated her license as a vendor. In a subsequent order, dated December 27, 1994, the Panel awarded Martin $449,923.70 in damages for loss of income, as well as attorney's fees and costs. The panel also ordered the Department of Rehabilitation to reinstate Martin's license, and to place her in another vending facility comparable to the one at the General Mail Facility.

Procedural History

On January 27, 1995, Brenda Premo, as Director of the California Department of Rehabilitation, filed the complaint in this action for declaratory judgment, and a petition for review of the decision and award of the ad hoc arbitration panel pursuant to 20 U.S.C. § 107d-2. The complaint alleges that the arbitration panel lacked authority to award, or to enforce any award for damages against the State pursuant to the Eleventh Amendment of the U.S. Constitution.

The Complaint alleges further that the panel violated the Fifth Amendment of the Constitution because the arbitration proceeding violated the Plaintiff's substantive and procedural due process rights. Specifically, the complaint alleges that one of the panel members, Robert Humphreys, previously served as an advocate on Martin's behalf, and his presence on the panel substantially prejudiced the Plaintiff's case. The complaint also alleges that the panel wrongfully permitted the testimony of Durward McDaniel, who participated in the arbitration as both a witness and an advocate on Martin's behalf.

The complaint prays for judgment declaring the award of the Arbitration Panel an unconstitutional and illegal exercise of power by the Panel, and an improper abuse of discretion. In the alternative the complaint prays for an order reversing the decision of the Panel and remanding the matter for a new arbitration hearing.

Martin filed a counterclaim on April 14, 1995, praying for an order "[a]pproving the orders of the arbitration panel in all respects and finding that the orders were not arbitrary, capricious, abuses of discretion and are otherwise in accordance with the law." Answer and Counterclaim of Defendant Jeana Martin to Plaintiff's First Amended Complaint, Prayer for Relief ¶ 1.

Discussion

1) Plaintiff's Motion for Summary Judgment

On August 18, 1995, the Plaintiff filed a motion for summary judgment. The Plaintiff argues that the Court should declare the Panel's decision unenforceable and unconstitutional under the Eleventh Amendment of the United States Constitution.

Martin opposes the Plaintiff's motion for summary judgment, and on September 7, 1995, filed a motion for summary judgment seeking judgment on the counterclaim. The Federal Defendants do not oppose the Plaintiff's motion for summary judgment.

Summary Judgment Standard

The Federal Rules of Civil Procedure provide for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court clarified the standard for summary judgment in three important case. *See Celotex Corporation v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson*, 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; a fact is material if it may affect the outcome of the suit. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative admissible

evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence from the non-moving party. The moving party need not disprove the other party's case. *See Celotex,* 477 U.S. at 325; *see also* Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial §§ 14:123-141 (1993).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. Rule 56(e). Summary judgment will be entered against the non-moving party, when appropriate, if that party does not present these specific facts. *Id.*

In assessing whether the non-moving party has raised a genuine issue, its evidence is to be believed, and all justified inferences are to be drawn in its favor. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970)). Nonetheless, "the mere existence of a scintilla of evidence" is insufficient. *Id.* at 252. As the Court explained in *Matsushita*, 475 U.S. at 586-87:

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial."

However, an alleged "genuine issue" will not defeat summary judgment where the factual context makes the non-movant's allegations implausible. *See California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 848 U.S. 1006 (1988). Consequently, where the factual context makes the non-movant's claim implausible, the non-movant "must come forward with more persuasive evidence to support their claim than

would otherwise be necessary" to show that there is a genuine issue for trial. *Id.*

The Eleventh Amendment

The Plaintiff argues that the award of the arbitration panel violated the Eleventh Amendment to the U.S. Constitution. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment has been interpreted as a grant of sovereign immunity to the states against suit in federal court. *Alabama v. Pugh*, 438 U.S. 781, 782, fn.1 (1978).

Congress has the power to override the states' sovereign immunity and permit suits against states by individuals. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Congress' intent to permit suits against the states, however, must be "unmistakably clear in the language of the statute itself." Legislative history is generally irrelevant in determining whether Congress intended to abrogate the Eleventh Amendment immunity of a state. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

In addition, a state can waive its Eleventh Amendment immunity, but such waiver is effective "only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).

In *Deleware Dep't of Health & Social Servs. v. United States Dep't of Educ.*, 772 F.2d 1123 (3rd Cir. 1985), the Third Circuit held that Deleware waived its Eleventh Amendment immunity with respect to arbitration awards under the Act when it agreed to participate in the Randolph-Sheppard program. The Court

examined the language of the Act which requires states desiring to become a state licensing agency to:

> make application to the Secretary and agree . . . to provide to any blind licensee dissatisfied with any action . . . an opportunity for a fair hearing, and agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration . . . .

20 U.S.C. § 107b(6). The Third Circuit noted that when Congress enacted the provisions of the Act requiring arbitration of vendor's grievances,

> the term arbitration had a well-recognized meaning. Congress was surely aware that arbitrators proceeding under the authority of the Federal Arbitration Act or under the authority of the Uniform Arbitration Act, as a matter of course awarded retrospective compensatory relief in appropriate cases. Furthermore, awards of back pay in arbitrations under collective bargaining agreements, were, by then, commonplace.

Delaware Dep't of Health & Social Servs., 772 F.2d at 1135 (citations omitted). The Court also noted that there was no indication, either in the text of the Act, or in its legislative history, that Congress "used the term arbitration in any manner different from its conventional usage in other contexts such as the Federal Arbitration Act." *Id.* at 1130. Thus, the relief an arbitration panel could award was not limited to exclude monetary damages. *Id.*

The Court held that Delaware waived any Eleventh Amendment immunity against a damage award by the arbitration panel when,

> with full notice of the Act's requirements, one of which was an agreement to arbitration, it voluntarily made application with the Secretary to participate in the Randolph-Sheppard program. The waiver of sovereign immunity with respect to arbitration could hardly have been made more clearly.

Delaware Dep't of Health & Social Servs., 772 F.2d at 1138.

The Plaintiff argues that this Court should decline to follow *Delaware Dep't of Human Servs.*, and instead urges the court to follow the decision of the Sixth Circuit in *Tennessee Dep't of Human Services v. United States Dep't of Education*, 979 F.2d 1162, 1168 (6th Cir. 1992), and a divided opinion of the Eight Circuit in *McNabb v. U.S. Dep't of Education*, 862 F.2d 681, 683 (8th Cir. 1988). These decisions held that an award of damages by an arbitration panel convened under the Randolph-Sheppard Vending Stand Act was unenforceable in federal court because the Act does not explicitly provide for enforcement of monetary damages against a state licensing agency in federal court.

The Court finds the reasoning of the Third Circuit in *Delaware Dep't of Human Servs.* to be persuasive, and declines to follow the decisions of the Sixth and Eighth Circuits. The Randolph-Sheppard Vending Stand Act clearly and unequivocally requires states participating in the Randolph-Sheppard program to agree to submit the grievances of vendors to arbitration. As the term arbitration is used in the Act, it clearly contemplates the possibility that an arbitration panel will award monetary damages, and that such an award is reviewable in federal court as the final action of the Secretary. The overwhelming implication that may be drawn from the text of the Act is that the Act requires participating states to waive their Eleventh Amendment immunity by requiring the states to agree to these procedures to resolve the grievances of vendors.

Accordingly, the court finds that California, by agreeing to participate in the Randolph-Sheppard program, waived its Eleventh Amendment immunity to the extent of actions by vendors brought under the Act. The court therefore DENIES the Plaintiff's motion for summary judgment, and GRANTS Martin's motion for summary judgment on the counterclaim as to the Eleventh Amendment issue.

2) Plaintiff's Motion for Disqualification of Arbitration Panel

The Plaintiff also moves, in the event the Court does not vacate the award of the arbitration panel on Eleventh Amendment grounds, for an order disqualifying the arbitration panel, and reversing its decision.

The Federal Defendants and Martin oppose this motion and have filed cross-motions for summary judgment. Martin also moves for summary judgment on her counterclaim, which seeks an order affirming the arbitration award.

The Fifth Amendment

The Plaintiff claims that the decision of the arbitration panel should be reversed because the panel deprived the Plaintiff of substantive and procedural due process in violation of the Fifth Amendment of the United States Constitution.

The word "person" in the context of the Due Process Clause of the Fifth Amendment does not encompass the States of the Union. *South Carolina v. Katzenbach*, 86 S.Ct. 803, 816 (1966). Because Plaintiff is suing in her official capacity as director of the Department of Rehabilitation, Plaintiff is the State of California for purposes of the Fifth Amendment. *See El Paso County Water Imp. District v. International Boundary & Water Com'n*, 701 F. Supp. 121, 123-24 (W.D. Tex. 1988) (political subdivision of the state is not a person for purposes of Fifth Amendment). Thus the Plaintiff does not enjoy the benefits of the Due Process Clause.

The provisions of the Administrative Procedure Act, however, provide for review of a decision of an arbitration panel, and authorize the Court to vacate a decision of the panel if it is arbitrary and capricious, contrary to constitutional right, power, privilege, or immunity, is in excess of jurisdiction or authority, or unwarranted by the facts. 5 U.S.C. § 706(2). The Plaintiff, in her reply, indicates that she will file a Third

Amended Complaint, if necessary, to seek review under the standards set forth under the Administrative Procedure Act.

The Court finds that even under the standard of review described in the Administrative Procedure Act, reversal of the arbitration panel's decision would not be not warranted.

The Second Amended Complaint raises two factual bases for the Plaintiff's contention that she was denied due process in the arbitration proceeding. First the complaint states claims that Robert R. Humphreys, the arbitration panel member appointed by Martin, exhibited bias and unfairly advocated Martin's position in the proceedings. Second, the complaint alleges that the panel improperly allowed the testimony of Durward McDaniel, an attorney who testified for Martin as an expert witness on the requirements of the Act. The complaint alleges that McDaniel improperly acted as both an advocate and as a witness for Martin.

Disqualification of Mr. Humphreys As a Member of the Arbitration Panel

Pursuant to the Act, Martin and the Department of Rehabilitation each appointed one individual to the panel. Martin appointed Robert Humphreys, and the Department of Rehabilitation appointed Joan Silverman. These two panel members then jointly selected Edna Francis to serve as chairperson and third member of the panel.

At the commencement of the arbitration proceeding, counsel for the Department of Rehabilitation objected to the appointment of Mr. Humphreys to the panel. The grounds for the objection was a letter dated February 13, 1990, written by Humphreys, on behalf of Martin, to the Department of Rehabilitation. Humphreys questioned the legality of the Postal Service's contract with Canteen Corporation. As a result, the Department argued that Humphreys had already expressed an opinion relating to the issues before the panel, and should therefore be disqualified as a panel member.

The panel overruled this objection. In response to the objection the chairperson stated:

> And I just want to indicate for the record that this same issue has been brought up in the past . . . I've been asked a question whether panel members were expected to be neutral. The other panel members were expected to be neutral in the same way that I'm expected to be neutral, and there was some further discussion and we concluded the matter with the understanding that, in spite of any previous involvement of Mr. Humphreys' part or on the part of anybody else other than myself, that the panel member, the party appointed panel member, is to bring his or involvement of Mr. Humphreys' part or on the part of anybody else other than myself, that the panel member, the party appointed panel member, is to bring his or her best judgment to resolve the dispute, and that concluded it at that time.

Reporter's Transcript, at 10-11.

Section 107d-2(b)(1)(B) does not limit or qualify the selection of a panel member by either the blind vendors or the state licensing agencies. The Act places a limit only on the selection of the chairperson of the panel: that member cannot be employed by the state licensing agency. 20 U.S.C. §107d-2(b)(1)(C).

If Congress intended to restrict a vendor's selection of an arbitration panel member it could have provided for such limitations in the Act, just as it placed limits on the selection of the chairperson of the panel. Thus, Martin's selection of Humphreys did not violate the Act and does not constitute grounds to disqualify the arbitration panel.

The Plaintiff contends that, "[t]hroughout the hearing, Mr. Humphreys revealed his bias by rigorously cross-examining the plaintiff-respondent's witness . . . and by aiding in the direct examination of both Martin and McDaniel." Motion to

Disqualify the Arbitration Panel at 15. The Randolph-Sheppard Act did not limit the selection of panel members by litigants to persons totally free of bias. Thus, even if the questioning by Humphreys were evidence of bias, disqualification of the arbitration panel is not be required.

Testimony of Durward McDaniel

The Plaintiff argues further that the decision of the arbitration panel should be reversed because one witness, attorney Durward McDaniel, testified as an advocate on Martin's behalf.

Martin called McDaniel to testify as an expert witness. McDaniel in his testimony expressed a legal opinion relating to the requirements of the Act, and whether the Department of Rehabilitation fulfilled its obligations to Martin under the Act. The Department of Rehabilitation objected to McDaniel's testimony because he formerly represented Martin in connection with the operation of the General Mail Facility vending facilities.

The panel chairperson overruled the Plaintiff's objection, and stated:

> The testimony will not be stricken from the record. Obviously the panel will review Mr. McDaniel's testimony in the context in which it was given, noting that he has served as a mediator and as an advocate at various times. But I do not believe that disqualifies him as a witness. He has spoken to issues which are obviously relevant to the disposition of the case.

R.T. at 218-19.

Assuming McDaniel's prior representation of Martin was evidence of bias, it is insufficient to disqualify him from testifying at the hearing. The witness' bias, however, should be considered by the arbitration panel when weighing the witness' reviewing court).

The arbitration panel was informed of McDaniel's bias, and indicated that it would consider his bias in evaluating his testimony. Furthermore, there is no evidence that the panel actually relied upon McDaniel's testimony in reaching its decision. McDaniel's testimony is not cited in the panel's opinion. Therefore, the panel's decision to allow McDaniel to testify was not an abuse of discretion and does not warrant reversal of the panel's decision.

C) Other Issues Presented in the Motion for Disqualification of the Arbitration Panel

The Second Amended Complaint cites the presence of Humphreys as a panel member, and McDaniel's testimony, as the only two factual bases for the claim that the panel decision violated the due process rights of the state. In the motion for disqualification of the arbitration panel, however, the Plaintiff presents a number of additional grounds which she contends require reversal of the arbitration panel's decision. These grounds are: (1) the decision of the arbitration panel was not supported by sufficient evidence; (2) the arbitration panel impermissibly ascribed binding precedential value to a 1981 San Francisco arbitration action involving the Department of Rehabilitation and the Postal Service; (3) no substantive right to challenge a state licensing agency's failure to bring a complaint against a federal agency exists; (4) the Randolph-Sheppard Act imposes no legal duty on the plaintiff to collect or account for vending machine income; (5) Plaintiff was under no legal duty to perform the remodelling sought by Martin; (6) the panel lacks authority to order license restoration; and (7) the panel erroneously awarded damages based on vending machine income for a period of time before the vending machine controversy was brought to the plaintiff's attention.

The Administrative Procedure Act contemplates that the Court will review "all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of an agency action" only

"[t]o the extent necessary to decision and when presented." 5 U.S.C. § 706. Plaintiff's Second Amended Complaint does not allege facts or legal theories that relate to the issues raised for the first time in the Plaintiff's motion. None of these issues were pleaded, thus, these claims are not properly before the Court.

3) Martin's Motion for Summary Judgment on the Counterclaim

On September 7, 1995, Martin filed a Motion for Summary Judgment on the Counterclaim. The Counterclaim seeks an order "[a]pproving the [August 18, 1994, and December 27, 1994] orders of the arbitration panel in all respects and finding that the orders were not arbitrary, capricious, abuses of discretion and are otherwise in accordance with the law." Answer and Counterclaim of Defendant Jeana Martin to Plaintiff's First Amended Complaint, Prayer for Relief ¶ 1. For the reasons expressed above, and after reviewing the record of the arbitration proceedings, the Court finds that the orders of the arbitration panel were adequately supported by the evidence, and were not arbitrary, capricious, or an abuse of discretion. Accordingly, Martin's Motion for Summary Judgment on the Counterclaim is granted.

CONCLUSION

For the foregoing reasons the Court DENIES the Plaintiff's Motion for Disqualification of the Arbitration Panel, and Plaintiff's Motion for Summary Judgment, and GRANTS the Federal Defendants' Motion for Partial Summary Judgment, and Martin's Motion for Summary Judgment on the Counterclaim.

IT IS SO ORDERED.

Dated: Feb 6, 1996

/s/ JOHN G. DAVIES
JOHN G. DAVIES
United States District Judge

CV 95-546-JGD (CTx)

SERVICE LIST

JAMES F. AHERN
DEPUTY ATTORNEY GENERAL
300 SO. SPRING STREET, STE 900 NORTH
LOS ANGELES, CA 90013

YTURBIDE & JENKINS
JAMES JENKINS
512 VAN NESS AVE., STE 408
SAN FRANCISCO, CA 94102-3267

CNSL FOR FEDERAL DEFTS
MARY L. PERRY,
ASST. U.S. ATTORNEY
ROOM 7516, FEDERAL BLDG
300 NO. LOS ANGELES STREET
LOS ANGELES, CA 90012

APPENDIX C

PROCEEDINGS BEFORE AN ARBITRATION PANEL
PURSUANT TO THE RANDOLPH-SHEPPARD ACT,
20 U.S.C. 107d-l(a) and 20 U.S.C. 107d-2

In the Matter of the Arbitration
involving
JEANA MARTIN,
Complainant
and
CALIFORNIA STATE DEPARTMENT
OF REHABILITATION, BUSINESS
ENTERPRISE PROGRAM,
Respondent

Case No. R-S/92-13

DECISION OF THE ARBITRATION PANEL

APPEARANCES: Janice A. Jenkins, Esq., Yturbide & Jenkins, for Complainant, and James F. Ahern, Deputy Attorney General, State of California, for Respondent.

The Arbitration Panel: Robert R. Humphreys, Panel Member selected by Complainant; Joan Conroy Silverman, Panel Member selected by Respondent; and Edna E. J. Francis, Panel Chair, selected by Mr. Humphreys and Ms. Silverman

Hearing: Held before the Arbitration Panel on April 14 and April 15, 1994, at 1221 E. Dyer Road, Suite 265, Santa Ana, California. On April 14, 1994 the panel, the parties, and their representatives visited the Santa Ana General Mail Facility of the U. S. Postal Service to obtain first-hand information about its lunchroom site and vending locations.

BACKGROUND

This arbitration proceeding was convened by the U. S. Department of Education, pursuant to 20 USC §107d-1, to resolve a complaint for arbitration dated June 29, 1992 and a supplement to the complaint dated November 4, 1993, both filed by Jeana Martin, Complainant herein. ("Complainant" and "Ms. Martin" will be used interchangeably throughout the decision.) In summary, the complaint and the supplement to the complaint allege that Respondent (Department of Rehabilitation, Business Enterprise Program), a State licensing agency (hereinafter "SLA") under the Randolph-Sheppard Act (hereinafter "the Act"), failed to fulfill various statutory obligations imposed upon it by the Act as a result of its status and of its relationship with Ms. Martin, a blind licensee.

The objective and purposes of the Act, which is codified at 20 U.S.C. §§ 107 et seq, are expressed, as follows, in 20 U.S.C. §107:

> **§ 107. Operation of vending facilities**
>
> **(a) Authorization**
>
> For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any Federal property.
>
> **(b) Preference regulations; justification for limitation on operation**
>
> In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this chapter; and

the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to assure that—

(1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 107d-3 of this title to achieve and protect such priority), and

(2) wherever feasible, one or more vending facilities are established on all Federal property to the extent that any such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

The statutory role and obligations of a State licensing agency under the Randolph-Sheppard Act are set forth, in part, in §107b of the Act:

§107b. Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated as the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree —

(1) to cooperate with the Secretary in carrying out the purpose of this chapter;
(2) to provide for each licensed blind person such vending facility equipment, and adequate initial stock of suitable articles to be vended therefrom, as may be necessary: *Provided, however,* That such equipment and stock may be owned by the licensing agency for use of the blind, or by the blind individual to whom the license issued: . . .
(3) . . .
(4) . . .
(5) . . .
(6) to provide any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and to agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 107d-1 of this title.

Section 107d-3 of the Act, referenced in 107, provides, in relevant part:

107d-3 Vending machine income

(a) Accrual to blind licensee and alternatively to State agency; calling on amount for individual licensee

In accordance with the provisions of subsection (b) of this section, vending machine income obtained from the operation of vending machines on Federal property shall accrue (1) to the blind licensee operating a vending facility on such property, or (2) in the event there is no blind licensee operating such facility on such property, to the State agency in whose State the Federal property is located, for the uses designated in subsection (c) of this section, except that with respect to income which accrues under clause (1) of this subsection, the Commissioner may prescribe regulations imposing a ceiling on income from

such vending machines for an individual blind licensee. In the event such a ceiling is imposed, no blind licensee shall receive less vending machine income under such ceiling than he was receiving on January 1, 1974. No limitation shall be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced, or operated by a blind licensee. Any amounts received by a blind licensee that are in excess of the amount permitted to accrue to him under any ceiling imposed by the Commissioner shall be disbursed to the appropriate State agency under clause (2) of this subsection and shall be used by such agency in accordance with subsection (c) of this section.

(b) Direct competition between vending machine and vending facility; proportion of accrued income from such vending machines for individual licensee

(1) After January 1, 1975, 100 per centum of all vending machine income from vending machines on Federal property which are in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section. "Direct competition" as used in this section means the existence of any vending machines or facilities operated on the same premises as a blind vending facility except that vending machines or facilities operated in areas serving employees the majority of whom normally do not have direct access to the blind vending facility shall not be considered in direct competition with the blind vending facility. After January 1, 1975, 50 per centum of all vending machine income from vending machines on Federal property which are not in direct competition with a blind vending facility shall accrue as specified in subsection (a) of this section, except that with respect to Federal property at which at least 50 per centum of the total hours worked on the premises occurs during periods other than

normal working hours, 30 per centum of such income shall so accrue.

(2) The head of each department, agency, and instrumentality of the United States shall insure compliance with this section with respect to buildings, installations, and facilities under his control, and shall be responsible for collection of, and accounting for, such vending machine income.

(c) . . .
(d) . . .
(e) . . .
(f) . . .
(g) Regulations for compliance

The Secretary shall take such action and promulgate such regulations as he deems necessary to assure compliance with this section.

The Act provides, as follows, for the filing of grievances by the blind licensee against the SLA or by the SLA against any agency of the United States, for alleged failure to comply with the provisions of the Act or with regulations promulgated under the Act:

§ 107d-1. Grievances of blind licensee
(a) Hearing and arbitration

Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 107b(6) of this title. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

(b) Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration

> Whenever any State licensing agency determines that any department, agency, or instrumentality of the United States that has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of this chapter or any regulations issued thereunder (including a limitation on the placement or operation of a vending facility as described in section 107B) of this title and the Secretary's determination thereon) such licensing agency may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 107d-2 of this title, and the decision of such panel shall be final and binding on the parties except as otherwise provided in this chapter.

In the context of at least the aforementioned, quoted provisions of the Act, and of applicable regulations, Complainant alleged that Respondent, in violation of the Act, failed to take any effective action in protecting Complainant's statutory priority under the Act to operate the vending locations on Federal property; failed to take timely effective action when, in mid-1989, the General Mail Facility (hereinafter "GMF") of the U. S. Postal Service in Santa Ana, California entered into an unlawful "break-even" contract with a commercial vending company encompassing the vending locations at the GMF; failed to take timely effective action to remodel Complainant's snack bar/lunchroom despite its recognition that remodeling was necessary to assure the effective conduct of her business; and terminated her license although Respondent's failures to protect Complainant's rights fostered the circumstances which led Respondent to terminate her license.

FACTUAL CONTEXT OF THE DISPUTE

The "Federal property" involved in this proceeding is the Santa Ana General Mail Facility (GMF) of the U. S. Postal Service, which was established in 1985 at 3101 W. Sunflower, Santa Ana, California. The facility comprises two floors with approximately 100,000 to 150,000 square feet of space. The facility, which processes mail bound for or sent from Orange County, California, operates twenty-four hours per day. At the times relevant to this complaint, approximately 1100 Postal employees worked at the facility during normal demand periods. During heavy periods, such as the Christmas season, the number of employees increased substantially.

From its inception, the GMF had a small snack bar/lunch room on the first floor, where employees could purchase food items, beverages, and snack items from vending machines and select a limited number of items, buffet-style, from a salad bar. In addition to the vending machines in the vicinity of the snack bar, throughout the facility, there were vending machines in break rooms, primarily on the first floor of the GMF, which offered beverages and snacks. Complainant, a blind licensee of Respondent, came to the facility in 1985 under the auspices of Respondent's Business Enterprise Program (hereinafter "BEP") and assumed control of the snack bar and 11 of 40 vending machines in the GMF. There had been one other vendor at the snack bar/lunchroom for a short period of time prior to Complainant's arrival. The vending locations not under Complainant's permit had already been let by the Postal Service to a private vendor prior to Complainant's arrival at the GMF.

From 1985 to 1989, Complainant built the vending facility at the GMF from a modest one generating $30,000 annual profit to one realizing, at its peak, an annual profit of $100,00. In addition, prior to October 1988, Ms. Martin received some income from some GMF vending machines which were located apart from her snack bar/lunchroom facility. By all accounts, except that of David Lyman, who was Plant Manager for the

facility "for seven or eight months in 1989 or 1990," Ms. Martin was a very good and creative vendor, labeled by her business counselor, as one of the best in the BEP.

Following up on an observation she had made even prior to coming to the GMF, that the set-up and physical scope of the snack bar were inadequate to offer optimal service, Ms. Martin requested remodeling and expansion of the facility in order to improve the service to her patrons. Patrons had been continually demanding more than Ms. Martin could offer, given the physical restraints of the facility itself. Both her business counselor, Richard Varvarinecz and the area supervisor for the BEP, John Westbrook, agreed that remodeling and expansion of service were necessary. In a memorandum dated August 10, 1989 to Mr. Flint, Assistant Chief, BEP, Mr. Westbrook expressed concern about the situation:

> Jeana Martin and I recently met with a group of post office managers at their request. The gist of the meeting was that they, and the postal employees as a whole, are very dissatisfied with our snack bar operation. They said they are getting constant complaints and their people are leaving the building for food service needs. They wanted to know what we could do to turn the situation around.
>
> It is apparent to me that, given the physical restraints of the facility itself, the postal employees want more than Jeana can provide. She is already pushing the stand's capabilities to its outer limits.
>
> I suggested that the only way to halt the criticism was to remodel the facility and in so doing expand the cooking facilities. I told them that we already had placed the snack bar on our remodel list and that with their help we could get the project underway soon. They stated that they would do whatever was required on their part and that they already have someone looking into expanding the snack bar facility.
>
> Since the meeting I have learned that the post office's "Quality of Life" committee has been working on a remodel

proposal for some time and that they are very anxious to meet with our architect.

I therefore request architectural (sic) services ASAP. This is a serious situation. If we do not act soon I am afraid that our vendor and our facility may be in jeopardy.

(Complainant's Exhibit L-3)

BEP officials continually promised Ms. Martin that renovation of the GMF snack bar facility was a top priority of the State's vending facility program. Mr. Westbrook so informed the Postal Service. By November 1989, Ms. Martin and the program's architect had collaborated and developed detailed plans for remodeling the facility. In November 1989, Mr. Edmon submitted the plans to the Postal Service for consideration. (Transcript, p. 30; Complainant's Exhibit L-S).

Meanwhile, Complainant, already experiencing decreasing patronage because of the inadequacy of the snack bar/ lunch room facility, was also experiencing adverse effects from the implementation of a "break-even" vending machine contract between the Postal Service and Canteen Corporation, the private vendor which operated vending locations at the GMF. As early as August 1986, BEP officials alerted Postal officials at the GMF facility of BEP's desire to participate in the bidding process when the vending machine contract for satellite operations within the GMF was open for bid. (Letter dated August 17, 1986 from Mr. Varvarinecz to Ms. Peggy Oliver - Complainant's Exhibit C-1). On March 8, 1988, Mr. Varvarinecz wrote again to the Postal Service, expressing BEP's belief that the vending machine contract would soon be up for bid and emphasizing BEP's desire to bid on the vending machines. In part, his letter, addressed to Ms. Levine in the Procurement Office, stated:

. . .

It would be our intent to assign the job duties and responsibilities of maintenance and stocking of these additional machines to Ms. Jeana Martin, who is currently employed by

our department as a cafeteria manager. We believe our manager would be in a much better position to provide service to these additional machines than what you may have experienced with a private contractor. In view of her work record as cafeteria manager and the fact that she currently maintains vending machines in the dining area I believe she would do a good job.

(Complainant's Exhibit C-4)

However, in 1989, without formal notice to BEP, the Postal Service began negotiations with Canteen Corporation to renew Canteen's contract for vending machine services at the GMF. Around August 1989, their negotiations culminated in a renewed contract between the Postal Service and Canteen regarding vending machine services at the GMF.

Shortly after the Postal Service renewed its contract with Canteen, Complainant called to Mr. Westbrook's attention what she regarded as unfair competitive practices by Canteen Corporation at the GMF. Mr. Westbrook, in turn, called the matter to the attention of Don Edmon, Interim Assistant Chief of Operations for BEP. In a memorandum dated September 11, 1989, wherein Mr. Westbrook also mentioned the urgent need to remodel the facility, Mr. Westbrook informed Mr. Edmon:

. . .

Another major concern that Ms. Martin and I have right now is the competitive vending machine contract. Canteen has a contract with the postal facility for approximately 16-20 machines in four employee break rooms (two of these rooms are adjacent to the cafeteria). These machines sell the same types of items that are sold through Jeana's machines. The contract with Canteen has just been re-negotiated. Rich Varvarinecz and I tried to get the Post Office to permit Ms. Martin to bid either as a blind vendor, or as an independent business person, but they refused on the grounds that they did not want to give Ms. Martin the machines and thus lose the competitive price control. They feel that under the permit they have no controls other than through competition.

> Last Friday Ms. Martin informed me that Canteen, under their new contract, has lowered its price on two major items: Coffee has gone from 25¢ to 10¢ and Pepsi from 30¢ to 15¢. Jeana cannot afford to lower her prices and they remain at 25¢ and 30¢ respectively. When Mr. Varvarinecz called the postal authorities to complain about the unfair competition he was told that it was the contracted price and that it would stand until the employees union negotiated a commission for itself, thus requiring Canteen to increase the prices.
>
> This morning I called Mr. Steve Leavey Mr. Leavey . . . is with the U. S. Postal Service in Washington, D. C. He is the liaison (representing postal employees) with regard to the Randolph-Sheppard Program. I explained the "unfair" competition that we were receiving from Canteen and I asked for his assistance. He asked for our post office liaison's name and number and promised that he would investigate and get back to me by tomorrow. I will relay any information that I get from him to you as soon as I get it.
>
> I understand that Ms. Martin has sought legal counsel from a source that is familiar with the Randolph-Sheppard Program and that she has been advised that she is entitled to all the machines in the building. I believe that the program should get a legal opinion and pursue this for her if this is the case.
>
> (Complainant's Exhibit E-l)

By letter dated October 6, 1989, Mr. Lam informed the manager of the GMF that the Postal Service was in violation of the Randolph-Sheppard Act:

> The Department of Rehabilitation, Business Enterprise Program would like your support in correcting an unacceptable violation of the Randolph-Sheppard Act at your facility. The blind vendor, Ms. Jeana Martin, has experienced more than

a fifty percent loss of income due to unfair and direct competition which started when your private vending machine was renewed September 1, 1989. Prices were immediately reduced in the private machines thereby reducing the volume of sales in the blind vendor's machines.

Further, the vending machine income owed to Ms. Martin has not been paid by your organization for the period of October 1988 through September 1989. The Department views the actions of your organization to be in violation of the letter and spirit of the Randolph-Sheppard Act (20 USC 107) and support federal regulations (34 CFR 395). We hereby request a meeting with you to immediately resolve this problem. Time is of the essence and unless the matter can be quickly resolved, the Department of Rehabilitation will be forced to pursue any and all remedial steps allowed by law. Your prompt attention and response is (sic) most appreciated.

(Complainant's Exhibit J-l)

By early 1990, the problem of vending machine competition still had not been resolved. In a letter dated April 12, 1990, Mr. Edmon, the Interim Administrator of BEP, informed the Department of Education (DOE) of the problem and requested their assistance:

. . .

In August of 1989, the postal facility (the Santa Ana GMF) implemented a new contract for vending food service at prices we feel create a break-even contract which has caused severe financial hardship to the blind vendor. The income to this vendor has been reduced by more than 60% since this contract started.

The postal facility failed to notify BEP when this contract was announced, in spite of a written request to notify BEP and allow us to bid.

. . .

> We are requesting your assistance in resolving this disagreement. If possible, we would be willing to meet, discuss, and resolve the problem without arbitration. If the postal facility is unwilling to do so, we would like to proceed with arbitration as soon as possible.
>
> (Complainant's Exhibit)

At the same time, BEP informed the Postal Service that the "break-even" nature of the contract between the Postal Service and Canteen had caused a severe financial hardship to the blind vendor and violated the Randolph-Sheppard Act, but that the BEP was willing to resolve the problem short of arbitration, if possible.

Relying upon the promises made to her by BEP representatives, Ms. Martin continually assured her patrons at the GMF snack bar that the facility would be renovated to produce a full-service cafeteria, and that, accordingly, service would be expanded to meet their demands, including the offering of hot foods and fried foods. However, Complainant's credibility and standing with patrons gradually eroded as the passage of time did not yield renovation or improve Complainant's ability to expand the menu, as BEP had promised Complainant. Patrons began to verbally abuse Complainant and to disparage Complainant and the manner in which the snack bar was operated. The disparagement increased with the patrons' discovery that the Canteen-operated vending machines at the GMF offered drinks and snacks at rates far below the reasonable rates at which Complainant offered them. For example, while Canteen charged 10 cents for a cup of coffee, Complainant was compelled to charge 25 cents in order to make a profit. While Canteen charged only 15 cents for Pepsi, Complainant was unable to charge less than 30 cents. Postal employees began to verbally abuse Complainant, referring to her a "price gouger." Many stopped patronizing the snack bar and used it only as a place to eat food purchased

elsewhere or brought from home. As a result of the loss of credibility and the consequent loss of patronage, Complainant's operation began to lose money at an accelerating rate.

In April 1990, Complainant filed a complaint against Respondent, alleging that Respondent was not fulfilling its obligations to her under the Randolph Sheppard Act. In May 1990, Mr. Ladas, the Deputy Director, Program Management and Support for BEP, responded to her grievance and agreed with that portion of it which alleged that the vending service contract between the Postal Service and Canteen was a "break-even contract" and that it had seriously hurt her income. However, Mr. Ladas found no basis for granting an administrative remedy. (Complainant's Exhibit D). Complainant filed an appeal of that decision with the Rehabilitation Appeals Board. (In March 1991, the Appeals Board found that appellant had suffered a significant loss of income as a result of the "break-even" contract, that BEP, without success, had taken steps to correct the problem, and that although BEP could have acted more aggressively on Complainant's behalf, it had justifiably demurred lest it jeopardize its good relations with the Postal Service and thereby adversely affect the interests of other blind vendors in the State. Complainant continued the appeal process regarding the complaint and it eventuated in the instant proceeding.)

On October 12, 1990, BEP filed a request for arbitration against the U. S. Postal Service, seeking cancellation of the "break-even" contract at the GMF, elimination of direct competition pricing with the BEP-licensed vendor there, and payment to the vendor of 100% of the income derived therefrom. However, prior to the pre-hearing conference, which was scheduled for September 24, 1991, BEP and the Postal Service settled the underlying dispute. Among the terms of the settlement, they agreed, that from the date of the signing of the agreement until the date of expiration of the contract with Canteen, the SLA would be entitled to 100% of the income from two vending locations in the vicinity of the lunchroom and

30% of the income from two vending locations along a wall opposite the lunchroom; that the Postal Service would not renew its contract with Canteen upon its expiration on July 31, 1992; that prior to that date, SLA would submit a permit application for the two vending locations in close proximity to the lunchroom, which application would be approved with an effective date of August 1, 1992 (portions, prices and variety of items to be subject to negotiation between the Postal Service and SLA); that prior to July 31, 1992, the SLA would submit a solicitation for the two additional vending locations on the opposite wall from the lunchroom and if selected as the operator, would enter into a standard food service contract and pay a commission to the Postal Service as would a private concessionaire; that if SLA were not selected as the concessionaire for those two locations, the Postal Service would share 40 percent of any commissions it received under the contract; that the Postal Service would meet and negotiate with SLA regarding the operation of any new vending locations added to the GMF; and that the Postal Service would make no back payments to Ms. Martin or to the SLA in connection with the dispute being settled by the settlement agreement. (Complainant's Exhibit H).

After the Department's settlement of its complaint against the Postal Service, Complainant continued to operate the lunchroom, with the same level of expenses and a decreasing level of income. As of the date of BEP's settlement of its arbitration complaint against the Postal Service, physical improvements to the snack bar/lunchroom facility had not begun, although blueprints for the remodeling had been produced as early as April 1990. Canteen continued with its "break-even" prices in the vending locations it operated, and neither Complainant nor the SLA received any income from the vending machines in those locations. Patrons continued to verbally abuse Complainant, to regard her as a "price gouger," to doubt her credibility because the remodeling had not taken place as she promised, and to shun the lunchroom. Complainant began to fall behind in the financial obligations of the

business, and tried to make ends meet by borrowing money from one account to pay another. She exhausted her life savings of $75,000, forced to use the money both for living expenses and business expenses. Without adequate income from her business, she fell behind in her sales tax obligations to the State of California. By August 1991, Complainant decided that the hostile business atmosphere at the GMF left her no choice except to leave the GMF. With the encouragement of the BEP, she relocated to three additional locations in Southern California after she left the GMF. However, none of the locations produced sufficient income to allow Complainant to satisfy or substantially reduce the snowballing financial obligations which followed her from the GMF. The amount owed for sales tax grew quickly to an insurmountable debt because of the continuous addition of interest and hefty penalties.

By letter dated June 25, 1992, BEP notified Complainant that her license to operate as a blind vendor would be terminated effective July 10, 1992 because of Complainant's failure to satisfy financial obligations to the State Board of Equalization and to the BEP. Complainant appealed the decision and requested a fair hearing before the Rehabilitation Appeals Board. Final decision regarding termination of the license was stayed pending completion of the appeals process. A hearing was scheduled to be held on July 27, 1992 in Sacramento, California. Complainant traveled to Sacramento to attend the hearing, but fell seriously ill and was unable to attend the hearing. Within a day or so of the hearing, she was hospitalized at U. C. Davis and underwent surgery for an aneurysm. At the conclusion of the appeals process, BEP followed through with its decision to revoke her license to operate as a blind vendor. As of the date of the hearing, the license had not been reinstated. Complainant has not been employed since the loss of her license and has no assets from which existing sales tax obligations or other business debts may be satisfied. Further, even if her license as a blind vendor is reinstated and she resumes control of a blind vendor facility, the State Board of

Equalization will install a keeper and assume control of her receipts until her past due sales tax obligations to the State of California have been satisfied.

DISCUSSION AND OPINION

Upon the complaint and supplement to the complaint, the evidence adduced at the hearing, the documentary evidence submitted by the parties, the post-hearing briefs of the parties, and the entire record herein, the Arbitration Panel finds that Respondent violated the letter and spirit of the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act"), as set forth below, in its relationship with Complainant. The testimony and documentary evidence establish the validity of the Complainant's claims against Respondent. Respondent failed to protect the program or uphold the law as it was bound to do under the assurances it gave the Secretary of Education in exchange for its designation as a State Licensing Agency ("SLA") pursuant to the Act.

In broad terms, the State violated the spirit and letter of the Act by failing to protect the priority accorded blind vending facilities under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which the blind vendors were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; and finally, by terminating without sufficient foundation Complainant's license and her means of self-support. Those failures, taken together, represent a substantial violation of the State's assurances to the Department of Education. Together, they also represent an abrogation of the State's duty to a particular blind vendor, Complainant, and a continuing neglect of the blind vendors and the program which supports them.

The Panel rejects Respondent's argument, in effect, that the SLA's only responsibility to a blind vendor is to help the

vendor establish the business. In fact, the SLA's responsibilities under the Act and the regulations which implement the Act are many and varied. For example, the SLA has full responsibility for the supervision and management of each vending facility. See 34 CFR §§ 395.3(a)(4), (5), (7), (8), and (11)(ii). Section 395.10 of the regulations requires the SLA to maintain all vending equipment in good repair and in an effective condition " . . . to ensure the continued successful operation of the facility." Section 395.11 requires the State to ensure that each blind vendor's maximum vocational potential is achieved.

Because only the State may bring an arbitration complaint against a Federal department, agency or instrumentality for violations of the Act and regulations, the State must act as both surrogate agent and protector of the blind vendor against the wrongs of a Federal department, agency or instrumentality – in this case, the Postal Service. Accordingly, in this case, the SLA had an obligation to ensure that the Postal Service observed the Act so that Complainant, in accordance with the intent of the Act, would be the beneficiary of its provisions.

Section 107d-3(a) of the Act states, in part, ". . . vending machine income obtained from the operation of vending machines on Federal property shall accrue . . . to the blind licensee operating a vending facility on such property . . ." The subsection further provides that no limitation may be imposed on income from vending machines, combined to create a vending facility, which are maintained, serviced or operated by a blind licensee. Subsection (b)(l) of Section 107d-3 states that the term "direct competition" means the existence of any vending machines or facilities operated on the same premises as a blind vending facility and that if direct competition exists the resident blind vendor is entitled to 100 percent of all income from vending machines on the property.

Notwithstanding the provisions of Section 107d-3, the record reflects that Complainant received income only from the vending machines which where physically located within her snack bar/lunchroom. Based upon documentation in the record

and information gleaned from the Arbitration Panel's site visit to the GMF, it is apparent that Complainant should have received 100 percent of the income from all four of the so-called "satellite" vending machine alcoves on the first floor of the GMF. Unquestionably, they were in direct competition with Complainant. Arguably, she also should have received income from the machines on the second floor of GMF. Although the SLA at one point asserted that Complainant was entitled to income at the same rate with respect to all machines at the GMF, it unjustifiably retreated from that position when the Postal Service opposed that position.

Furthermore, the State clearly knew, as early as 1986 of the existence of the Canteen contract, and that it would expire in 1988 or 1989. (*See*, for example, Complainant's Exhibit C-1, August 26, 1986 letter from Mr. Varvarinecz to Ms. Oliver, USPS, noting that the satellite vending contract would soon be open for bid; Complainant's Exhibit C-2, January 19, 1987 letter from Mr. Varvarinecz to Karen Kim, USPS, similar expression; Complainant's Exhibit C-3, August 4, 1987 letter from Mr. Flint, Assistant Administrator of the State BEP Program to Larry Anderson, USPS, suggesting that a sole source permit for the satellite vending machines be assigned to Jeana Martin; Complainant's Exhibit C-4, March 9, 1988 letter from Mr. Varvarinecz to Ms. Levine again noting the expiration of the vending contract and asking that the machines be serviced by Ms. Martin.) Thus, the fact that the Postal Service did not formally notify the SLA that the contract was expiring does not excuse the SLA's failure to timely and forcefully intervene on Complainant's behalf. It had sufficient information at its disposal to protect and enforce Complainant's rights regarding the vending locations operated by Canteen. Pursuant to Section 395.32(h) of the regulations, SLA should have insisted upon Complainant's right to receive income from the vending locations. Section 395.32(h) of the regulations states:

> All arrangements pertaining to the operation of vending machines on Federal property not covered by contract,

> with or by permits issued to, a State licensing agency, shall be renegotiated upon the expiration of the existing contract or other arrangement for consistency with the provisions of this section.

The State's acceptance of a position as supplicant to the Postal Service is not defensible, given the provisions of the Act. The SLA should have demanded — not requested — that all income from the vending machines be assigned to Complainant, and to the program. It had an obligation to make such a demand, and to continue through arbitration and litigation, if necessary, to insist that the Postal Service turn over vending machine income to the BEP. While Federal property managing agencies have affirmative obligations under the Act, States also have obligations. When a Federal agency impedes the blind vending program or violates the Act, as the Postal Service did here, the State must fill the void and assert its role as protector of its vendors. In this case, the State failed to meet its very clear obligations in that regard.

Little attention can be seriously paid to Respondent's assertion in its post-hearing brief that the renegotiated vending contract between the Postal Service and Canteen Corporation is not a "break-even" contract. The assertion is belied by numerous pieces of correspondence in the evidentiary record which show that the State recognized the contract negotiation to be for a "break-even" situation, with a 4% fee to be provided to the Postal Service for the GMF's employees' recreation association. (*See*, for example, letters and memoranda in the record from Don Edmon, Hao Lam, and John Westbrook. Complainant's Exhibits C-5, E-1, G, J-1, and L-5.) The State also had the benefit of valuable, on-point precedent in the 1981 San Francisco arbitration case involving the Department of Rehabilitation against the Postal Service, wherein the Arbitration Panel found that "[t]he break-even policy is generally inconsistent with the intent of the Act." (Complainant's Exhibit K, p. 15). That decision is of great weight, if not binding, in

determining the responsibility of both the U. S. Postal Service and the State Licensing Agency.

The denigration of Complainant's ability, responsibility, and professionalism by Respondent, through its counsel, is wholly unjustified. Such a position on Respondent's part during the course of the hearing and thereafter is diametrically at odds with record statements of Respondent's own officers — those who are arguably in the best position to know about Complainant's performance as a vendor and the quality of her operation. John Westbrook, the Supervisory Business Enterprise Counselor, referred to Ms. Martin as "one of our more successful vendors" and "one of our best vendors." (Complainant's Exhibit E-1). Comprehensive evaluation reports on Ms. Martin's operation in 1988 and 1990 unwaveringly characterized Complainant and her vending facility as "excellent," "exceptional," and "responsible." The overall comment in BEP's 1990 evaluation of Complainant — which encompassed the period during which Postal employees and management allegedly registered strong dissatisfaction regarding Complainant and the condition of her facility — sums up the Department's impressions of Ms. Martin, and bears repetition here: "Jeana has proven to be an exceptional BEP vendor. She is operating a very difficult location and she had made many improvements that have been appreciated by customers and building management alike. Jeana should have no problem running any BEP location." (Complainant's Exhibit E-4, at page 3). The Panel finds BEP's contemporaneous evaluation reports of Complainant and the facility more credible than the generalized criticisms Mr. Lyman offered during his testimony and Mr. Deapen made in his declaration. Further, there is no evidence that the Postal Service ever documented and called to the attention of Complainant any specific complaints regarding quality control or sanitation matters regarding the snack bar. The evaluation reports just cited state, in part, "Jeana is a responsible manager and vendor. She has a very good sanitation record and pays attention to the details of supervising employees who prepare

and handle food." (Complainant's Exhibit E-3, at page 2); "Jeana has always passed sanitation inspection with little or no difficulty. She does a very good job in this area because she knows the value of good sanitation and what it means to customers." (Complainant's Exhibit E-4, at page 2).

BEP officials who were personally familiar with the snack bar/lunchroom at GMF recognized quite clearly the connection between Postal employee dissatisfaction and frustration and the failure of the State to remodel Complainant's vending facility into a full-service cafeteria. In a memorandum to James Flint, Assistant Chief, BEP, John Westbrook stated: "It is apparent to me that, given the physical restraints of the facility itself, the Postal employees want more than Jeana can provide. She is already pushing the stand's capabilities to its outer limits." (Memorandum dated August 10, 1989, Complainant's Exhibit L-3). On the very same day, Mr. Westbrook wrote to the Human Resources Director of the GMF facility assuring him that "we are prepared to spend a large sum of money to remodel this facility — in fact, I would hope that the new facility could be a model for future BEP postal facilities." (Letter from J. Westbrook to J. Burns, August 10, 1989). Despite the SLA's recognition of the urgent need to remodel the facility, in the final analysis, it failed both Ms. Martin and other beneficiaries of the blind vending program. (*See* 34 CFR §§ 395.3, 395.10, and 395.11). The inordinate delay in remodeling the facility substantially contributed to Complainant's loss of income from the snack bar/lunchroom facility.

Further, the existence/continuation of Canteen's illegal "break-even" contract with the Postal Service also substantially contributed to Complainant's loss of business and income at the GMF. Although the SLA was the only agency with legal standing to challenge the Postal Service's violations of the Randolph-Sheppard Act, it withdrew its challenge despite being urged to pursue it to various levels, despite its knowledge that failure to do so would be deeply injurious to Complainant, and despite the fact that the settlement with the Postal Service was

against public policy because it was contrary to the Act and its intent. Contrary to the justification it offered for failing to formally challenge the Postal Service earlier than October 1990, the SLA was without authority to compromise Complainant's rights under the Act on the theory that enforcement of her rights may antagonize the Postal Service and jeopardize present and future BEP opportunities with the Postal Service.

In summary, Complainant's misfortunes flowed directly from the SLA's failure to insist on prompt renovation of the vending facility, its failure to insist on assignment of all vending machine income to her, and its failure to take immediate formal action to void the illegal "break-even" contract between the Postal Service and Canteen Corporation. Compounding its failures, the Department of Rehabilitation wrongly shifted from itself to Complainant the blame for her misfortunes and, as a result of those misfortunes, terminated her license — following a hearing at which Complainant, for good cause, was unable to appear.

AWARD RE LIABILITY

Respondent violated the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act") in its relationship with Complainant by failing to protect the priority accorded Complainant in her capacity as a blind vendor under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which it and Complainant were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; by failing to expeditiously act to ensure prompt renovation of the snack bar\lunch room; and finally, by terminating, without sufficient foundation, Complainant's license as a blind vendor and, thus, her means of self-support.

The Arbitration Panel hereby orders the parties to submit briefs (postmarked on or before September 7, 1994), together with any additional evidence pertinent to the issue of remedy, addressing the appropriate remedy or remedies to be awarded by the Arbitration Panel."

Date: August 18, 1994

/s/ Edna E. J. Francis
Edna E. J. Francis
Chair, Arbitration Panel

Panel Member Humphreys concurs with the decision. Panel Member Silverman dissents from the decision.

PROOF OF SERVICE BY MAIL

I declare as follows:

I, the undersigned, am a citizen of the United States, over eighteen years of age, and not a party to the within action. My business address is P. O. Box 65556, Los Angeles, California 90065.

On August 19, 1994, I served the within DECISION OF THE ARBITRATION PANEL - CASE NO. R-S/92-13 (dated August 18, 1994) on the individuals identified by name and address immediately below by causing a true copy of the DECISION to be placed in a sealed envelope and thereafter sent by certified mail, return receipt requested, with appropriate postage affixed, to each of the named individuals, as indicated below:

Robert R. Humphreys, Esq.
1101 -17th Street, N.W.
Suite 803
Washington, D. C. 20036

Joan Conroy Silverman, Coordinator
Dispute Resolution Program
Community Services Agency
1300 South Grand, Building B
Santa Ana, CA 92705

Janice A. Jenkins, Esq.
Yturbide & Jenkins
414 Gough Street, Suite 2
San Francisco, CA 94102-1416

James F. Ahern
Deputy Attorney General
State of California
300 S. Spring St., Suite 500
Los Anqeles, CA 90013

George F. Arsnow, Chief
Vending Facility Branch
Rehabilitation Services Administration
400 Maryland Avenue
Washington, D. C. 20202

I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Edna E. J. Francis
Edna E. J. Francis

APPENDIX D

PROCEEDINGS BEFORE AN ARBITRATION PANEL
PURSUANT TO THE RANDOLPH-SHEPPARD ACT,
20 U.S.C. 107d-l(a) and 20 U.S.C. 107d-2

In the Matter of the Arbitration
involving
JEANA MARTIN,
Complainant
and
CALIFORNIA STATE DEPARTMENT
OF REHABILITATION, BUSINESS
ENTERPRISE PROGRAM,
Respondent

Case No. R-S/92-13

DECISION OF THE ARBITRATION PANEL
(Remedy Only)

APPEARANCES: Janice A. Jenkins, Esq., Yturbide & Jenkins, for Complainant, and James F. Ahern, Deputy Attorney General, State of California, for Respondent.

The Arbitration Panel: Robert R. Humphreys, Panel Member selected by Complainant; Joan Conroy Silverman, Panel Member selected by Respondent; and Edna E. J. Francis, Panel Chair, selected by Mr. Humphreys and Ms. Silverman

Hearing: Held before the Arbitration Panel on April 14 and April 15, 1994, at 1221 E. Dyer Road, Suite 265, Santa Ana, California. On April 14, 1994 the panel, the parties, and their representatives visited the Santa Ana General Mail Facility of the U. S. Postal Service to obtain first-hand information about its lunchroom site and vending locations. Subsequently, the issues regarding appropriate remedy, primarily reserved to the second half of this bifurcated proceeding, were addressed through documentary evidence and briefs from both parties.

BACKGROUND

On August 18, 1994, Arbitration Panel Chair Francis issued the following award, in which Panel Member Humphreys concurred, finding that Respondent had violated the Randolph-Sheppard Act, 20 USC §§107-107e (hereinafter "the Act") in a number of respects:

> Respondent violated the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107e ("the Act") in its relationship with Complainant by failing to protect the priority accorded Complainant in her capacity as a blind vendor under the Act; by failing to insist upon remittance to the State's blind vending program of all vending machine income to which it and Complainant were entitled; by failing to stand firm against the promulgation and continuation of a break-even contract which proximately and directly led to Complainant's economic demise; by failing to expeditiously act to ensure prompt renovation of the snack bar/lunch room; and finally, by terminating, without sufficient foundation, Complainant's license as a blind vendor and, thus, her means of self-support.

Having determined that Responden is liable to Complainant, Jeana Martin, the Arbitration Panel, incorporating its prior award regarding liability, now makes the following award regarding remedy.

FINDINGS

The Arbitration Panel finds that the foregoing violations by Respondent, which led to Complainant's economic collapse, are fully compensable. Because Respondent's acts and omissions proximately and directly caused extensive economic injury to Complainant, Complainant is entitled to an award encompassing all losses traceable to those acts and omissions. Further, the award requires, to the extent such restoration can

be effectuated, the restoration of Complainant to the economic position and the employment status she enjoyed prior to the time Respondent violated the Act and Complainant's rights. The Panel's award regarding remedy includes compensation for loss of income from competing vending machines during Complainant's tenure at the General Mail Facility (GMF); loss of income occasioned by the break-even contract between the U. S. Postal Service (USPS) and Canteen Corporation; loss of income due to Respondent's failure to remodel; loss of income due to the termination of Complainant's blind vendor license to operate a vending facility; attorney's fees and costs; restoration of Complainant's license, including her seniority status; and assignment of Complainant to a vending facility acceptable to her, which is comparable in income potential to the Santa Ana GMF.

The elements taken into consideration by the Panel in making this award, and the remedial amounts decided upon, are as follows:

1. Reduction of Complainant's net income from her own vending machines attributable to the existence of the break-even contract between the USPS and Canteen Corporation, from the date the break-even contract took effect (July 31, 1989) until the date Complainant's tenure at the GMF was terminated (August 1991). The amount in this category, although real, is speculative. The Panel believes that its award under Item 2, immediately below, adequately covers Complainant's loss occasioned by the "satellite" vending machines because it provides an amount reflecting the low range of income she would have realized from those machines if she had operated them (like her successor, Patricia Evans, who now operates the machines).

2. Income from four "satellite" vending machine alcoves on the first floor of the GMF, from June 16, 1985 (the inception of Complainant's facility operation) until August 1991, when the Complainant's facility operation terminated. Based upon the records furnished by Complainant's attorney, and the declara-

tion of Patricia Evans, the satellite alcove machines have provided a minimum of $4,000 per month, and as much as $6,000 per month, of additional income to the vending facility — income which should have accrued to Complainant during her tenure at the GMF. In order to do justice, and at the same time not speculate on an exact amount, the Panel awards Complainant the minimum amount of $4,000 per month for the period of her stewardship at the GMF, or a total of $300,000 (75 months x $4,000).

3. An amount representing the cost in income to Complainant of the delay, from May 1990, the date Respondent formally notified Complainant that it would not remodel the snack bar/lunch room facility at the GMF, until August 1991, when Complainant left the facility. Although the Complainant argues strenuously that the *entire period* of her GMF operation should be counted toward the cost to her of Respondent's failure to renovate, the Panel must limit its award to that period encompassing the date Respondent "went on record" with its refusal to remodel (May 1990) and the date Complainant left the GMF (August 1991). Such calculation is a reasonable measure of damage to Complainant regarding this element. Accordingly, the Panel awards a total of $35,971.65 for this element, based upon the following calculation: $14,534 (monthly difference between pre-remodeling and post-remodeling non-machine gross receipts reported by Ms. Evans) x 16.5% (non-machine net profit reported by Ms. Evans) x 15 months = $35,971.65.

4. An amount reasonably calculated to make Complainant whole for the period from April 16, 1993, when her license was terminated by the State, until the date of this award, December 27, 1994. Although it could be argued that Complainant is entitled to the average amount of income she generated over the last several years she operated as a vendor, the Panel, in order to avoid speculation, awards Complainant an amount which corresponds to the average net income of blind vendors in the United States, according to FY 1993 report, the most recent calculation available to the Panel. Therefore, the Panel awards

a total of $43,053.40 (Average annual net income of $25,832 divided by 12 = $2,152.67 x 20 months = $$43,053.40).

5. The amount of reasonable attorney's fees, costs, and expenses incurred by Complainant in prosecuting her rights under the Act, beginning with fees and expenses related to the filing of her grievance with the State on April 24, 1990, up to and including those fees and expenses incurred as of the date of this award. In that regard, the declaration of Complainant's attorney, Janice Jenkins, with its attached time sheets and a list of expenses, appears to reflect a reasonable hourly rate and a reasonable total. The Panel, therefore, awards Complainant her attorney's fees in the amount of $68,977.00 and expenses in the amount of $1,921.65, for a total of $70,898.65.

AWARD RE REMEDY

The Arbitration Panel hereby awards monetary compensation, including damages, restitution, and fees and expenses, in the amount of $449,923.70. Respondent is directed to pay the foregoing amount to Complainant within 30 days following the date of this award. Interest as determined in accordance with California law for the payment of damage judgments by the State shall apply to any amounts not so paid.

The Arbitration Panel further directs Respondent to reinstate Complainant's blind vendor license and to place her forthwith in a vending facility comparable to the General Mail Facility at Santa Ana, California. In the event no such comparable facility is immediately available, Respondent is directed to pay compensation to Complainant each month, beginning January 1995, in an amount equivalent to the net income Complainant would have received had she been placed in such a facility. Based upon the submissions in the record in this proceeding, such monthly amount payable shall be S5,731.94.

The Arbitration Panel shall retain jurisdiction of this case for 90 days following the date of this award for the purpose of receiving any motion, information, or other matter related tothe effectuation of the Panel's decision and award.

Dated: December 27, 1994

/s/ Edna E. J. Francis
Edna E. J. Francis
Chair, Arbitration Panel

Panel Member Humphreys concurs with the award in its entirety. Panel Member Silverman concurs only with those remedies ordering payment of attorney's fees and expenses, reinstatement of Complainant's blind vendor license, and reinstatement of Complainant to a vending facility comparable to the GMF, and dissents from the award of monetary compensation for damages.

PROOF OF SERVICE BY MAIL

I declare as follows:

I, the undersigned, am a citizen of the United States, over eighteen years of age, and not a party to the within action. My business address is P.O. Box 65556, Los Angeles, California 90065.

On December 27, 1994, I served the within DECISION OF THE ARBITRATION PANEL (REMEDY ONLY), dated December 27, 1994, re CASE NO. R-S/92-13, on the individuals identified by name and address immediately below by causing a true copy of the DECISION to be placed in a sealed envelope and thereafter sent by certified mail, return receipt requested, with appropriate postage affixed, to each of the named individuals, as indicated below:

Robert R. Humphreys, Esq.
1101-17th Street, N.W.
Suite 803
Washington, D.C. 20036

Joan Conroy Silverman, Coordinator
Dispute Resolution Program
Community Services Agency
1300 South Grand, Building B
Santa Ana, CA 92705

Janice A. Jenkins, Esq.
Yturbide & Jenkins
414 Gough Street, Suite 2
San Francisco, CA 94102-1416

James F. Ahern
Deputy Attorney General
State of California
300 S. Spring St., Suite 500
Los Angeles, CA 90013

George F. Arsnow, Chief
Vending Facility Branch
Rehabilitation Services Administration
400 Maryland Avenue
Washington, D.C. 20202

I declare under penalty of perjury that the foregoing statements are true and correct.

/s/ Edna E.J. Francis
Edna E.J. Francis